29 august 2003 4:00pm

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,

VS.

CR 03-3089,
CR 03-3090,
CR 03-3091
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT LEE BOYD MALVO'S MOTION TO PRECLUDE THE COMMONWEALTH FROM SEEKING THE DEATH PENALTY WHERE THE DEFENDANT WAS A JUVENILE AT THE TIME OF THE OFFENSE BECAUSE EXECUTION OF JUVENILES VIOLATES INTERNATIONAL LAW AND AMERICAN TREATY COMMITMENTS.

TO THE HONORABLE JANE MARUM ROUSH, JUDGE:

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and respectfully files this Motion, and in support thereof states as follows:

1. The defendant, Lee Boyd Malvo, was born on February 18, 1985. He is currently incarcerated at Fairfax County Jail.

2. The defendant is charged in Fairfax County with two counts of capital murder, and one count of use of a firearm in the commission of a murder. The underlying crimes are alleged to have occurred when the defendant was seventeen years old. Trial is scheduled before this honorable Court beginning November 10, 2003.

3. It is anticipated that the Commonwealth will seek to impose the death penalty upon Lee Boyd Malvo.

4. This honorable Court is now asked to bar application of that extreme

punishment in this case. Subjecting petitioner to the death penalty for a crime allegedly committed when he was seventeen years old would violate international treaties, including the International Covenant on Civil and Political Rights, and would violate customary International Law, the principle of *jus cogens*, and the Constitutions of both the United States and the Commonwealth of Virginia.[1]

A. INTERNATIONAL LAW PROHIBITS THE EXECUTION OF JUVENILE OFFENDERS

Treaty Obligation, and the International Covenant on Civil and Political Rights

5. Under Article VI, section 2, the Supremacy Clause of the United States Constitution, "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding".

6. The United States ratified the International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), a multilateral international treaty, in 1992.[2] Art. 6(5) of the ICCPR explicitly provides:

> Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out against pregnant women.

7. Upon ratification, the United States Senate purported to reserve for the United States the right " subject to its Constitutional constraints, to impose capital punishment on any person. . . including such punishment for crimes committed by

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[1] The violation of international treaty, customary international law and ***jus cogens*** constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

[2] The full text of the ICCPR is forth at Appendix "1", and can be found along with the other treaties cited herein at http://untreaty.un.org (United Nations Treaty Website).

persons below eighteen years of age". See 31 I.L.M. 645, 653-54 (1992), 138 CONG. REC. 54781-01 § I (2) (daily ed. Apr. 2, 1992). Not one other signatory-nation to the ICCPR has a reservation to Art. 6.5. [3] See William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?* 21 BROOK.J. INT'L. L. 277 (1995) [hereinafter, "Schabas"]. The United States put forward this reservation in order to permit the various states to continue to execute juvenile offenders. The reservation is invalid, for a number of reasons.

8. First, the Senate reservation is invalid pursuant to the international treaty that governs treaty interpretation, the Vienna Convention on the Law of Treaties, 8 I.L.M. 679, 1155 U.N.T.S. 331 (adopted May, 1969, entered into force January 27, 1980) [hereinafter, "Vienna Convention"].[4] A nation- state "may, when signing, ratifying, accepting, approving, or acceding to an international treaty, formulate a reservation *unless. . . . the reservation is incompatible with the object and purpose of the treaty.*" Vienna Convention, Art. 19(c) (emphasis supplied). But by signing a treaty, even prior to its ratification a nation has agreed to bind itself in good faith to ensure that nothing is done that would defeat the treaty's "object and purpose", pending ratification. See Vienna Convention, Art. 18 ("A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty. . . subject to ratification, acceptance, or approval, until it shall have made its intention clear not to

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[3] This provides testament to the norm's universal acceptance, except in a few states of the Unites States, as will be discussed infra.

[4] While the United States has not yet ratified the Vienna Convention, a "treaty designed to govern all other treaties," our Department of State has taken the position that it is the authoritative guide to existing treaty law and procedure. See the Vienna Convention on the Law of Treaties, S. EXEC. DOC. NO. 92-1, 92d Cong.,1st Sess. 1 (1974). See also Nicholls, *Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 Emory Int'l.L. Rev. 617, 639 (1991). The Vienna Convention "permeates the whole body of the international regulation and creates the fundamental framework within which this regulation operates." Maria Frankowska, The Vienna Convention on the Law of Treaties Before the Unites States Courts, 28 Va.J. Int'l.L. 281, 286 (1998). And the American Law Institute, in revising the Restatement of the

become a party to the treaty. . . . "). See also Restatement Third of Foreign Relations Law of the United States, Sec. 313 (1) (c)(1987); United Nations' Human Rights Commission, General Comment No. 24 (52), paras. 6, 10, and 18 (cited and discussed infra, and reproduced herein as Appendix "2").

Article 6.5 is essential to the ICCPR's "object and purpose". The central purpose of Article 6 *in toto*, the "right to life" provision of the treaty, is to impose limitations of the death penalty. One of those express limitations is the prohibition against death sentences for crimes committed by juveniles. See Article 6, and see Schabas, supra. Indeed, the "object and purpose" of the ICCPR as a whole is to create "minimum legally binding standards for human rights, which. . . shall extend to all parts of federal States without any limitation or reservation." See The Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions [hereinafter, "Report of Special Rapporteur"] reproduced as Appendix "3" herein, at para. 17. In fact, in ratifying the ICCPR the Senate Committee on Foreign Relations itself noted:

> The (ICCPR) guarantees a broad spectrum of civil and political rights, rooted in basic democratic values and freedoms, to all individuals within the territory or under the jurisdiction of the States Party. . . [T]he covenant obligates each state party to respect and ensure these rights, to adopt legislation or other necessary measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated.

Foreign Relations Committee Report on ICCPR, 31 I.L.M. 645, 648-49. The Committee went on to say that " the (ICCPR) is part of the international community's efforts to give the full force of international law to the principles of human rights is embodied in the Universal Declaration of Human Rights and the United Nations Charter" Id., at 649. The

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Foreign Relations Law of the United States, took the Vienna Convention as its "black letter" for setting out principles related to the law of treaties. Id.

United States even jointly sponsored a United Nations General Assembly resolution that Article 6 of the ICCPR (which of course embodies Art. 6.5, the norm that prohibits executing juveniles) establishes a "minimum standard" for all member states, whether or not they had adopted that treaty. G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980).

Because the Senate's "reservation" directly and irreconcilably conflicts with the object and purpose of the ICCPR, the reservation is invalid.

9. The Senate's purported reservation to Article 6.5 of the ICCPR also is a nullity because, under express terms of Article 4.2 of the ICCPR, any reservation to Article 6 is void ("no derogation from Article 6 . . . may be made under this provision") See also Vienna Convention, supra, Art. 18 a, 8 I.L.M. 679, 1155 U.N.T.S. 331, 336-37 (1997). The ICCPR was signed and ratified by the United States without reservation or objection to Article 4.2. In itself, too, this non-derogation clause is another indicator of how critical Art. 6.5 is to the framework of the ICCPR.

10. The United Nations Human Rights Commission (hereinafter "HRC") is the international body designated to interpret the ICCPR. The HRC also has determined that the Senate's attempted reservation is a nullity.

By ratifying the ICCPR and participating in the election of officers to the HRC, the United States expressly recognized the HRC's authority.[5] A number of federal courts also have explicitly acknowledged the HRC's authority in matters of the ICCPR's interpretation. See, e.g., United States v. Duarte-Acero, 208 F.3d 1282, 1287 (11th Cir. 2000) (the HRC's guidance may be the "most important" component in interpreting

ICCPR claims); United States v. Benitez, 28 F. Supp. 2d 1361, 1364 (S.D. Fla. 1998) (same); United States v. Bakeas, 987 F. Supp. 44, 46, n.4 (D.Mass. 1997) (HRC has "ultimate authority to decide whether a party's clarifications or reservations have any effect"); Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) (HRC interpretations as "authoritative").

11. The HRC issued a General Comment in April 1994 that addressed the effects of attempted reservation to the ICCPR:

> 1. " [W]here a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the *object and purpose* of the treaty."
> 2. "Reservations that offend *peremptory norms* would not be compatible with the object and purpose of the Covenant. . . Accordingly, a state may not reserve the right to execute children."
> 3. "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has *heavy onus* to justify such a reservation."
> 4. "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation"

United Nations Human Rights Committee, General Comment No. 24 (52) Relating to Reservations at paras. 5,6,8,10,18, as reported in 15 Hum. Rights Law Journal 465 (1994) (heretofore and hereinafter, HRC General Comment, reproduced as Appendix "2" herein) (emphasis added).

The United States cannot meet the "heavy onus" required to validate a reservation. The Senate justified its reservation to Article 6.5 on the grounds that prompt

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[5] Declarations recognizing the competence of the Human Rights Committee under Article 41, *Multilateral Treaties Deposited with the Secretary General, Status as of 31 December 1994*, U.N. Doc. ST/LEG/SER.E/ 13 at 133 (1995), at http://untreaty.un.org

ratification of the treaty would not be obtained if the non-complying states within the United States had to raise their death penalty eligibility ages first. 31 I.L.M. 645, 650 (1992). This does not approach remotely acceptable justification for derogation (e.g., national emergency see ICCPR 4.1) The United States Falls short of meeting the "heavy onus" of justification for its reservation to Article 6.5, and the "reservation" would be invalid for this reason alone.

The Senate's reservation is invalid or ineffective under every other of these recited HRC guidelines as well. As outlined, the purported reservation conflicts with the treaty's object and purpose. It also offends customary international law and the peremptory *jus cogens* norm, detailed infra, against the execution of juvenile offenders. And the reservation is wholly severable, as will also be discussed, so that the entire treaty remains in effect in the United States.

12. For all of these reasons, the HRC expressly concluded that the United States' reservation to Article 6.5 is invalid, [6] as has the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, [7] and as have eleven of the treaty's European signators. [8] Particularly regarding this last point it is noteworthy

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[6] See HRC General Comment, at appendix "2". Additionally, in its first report on compliance, the Human Rights Committee said:

> Para. 279. The Committee is . . . particularly concerned at reservations to Article 6, paragraph 5, and Article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.
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> Para. 281. [The HRC] "deplores provisions in the legislation of a number of states which allow the death penalty to be pronounced for crimes committed by persons under 18. . . . ."

Report of the Human Rights Committee, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40, U.N. Doc. A/50/40 (October 3, 1995), paras. 279, 281.

[7] " The special Rapporteur wishes to emphasize that international law clearly indicates a prohibition of imposing the death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but ' also the imposition of a sentence of death on a juvenile offender . . ." See "Report of Special Rapporteur, Appendix "3", at para. 55 See also paras. 49,50

[8] This unusual step of writing to deplore formally another nation-states proposed "reservation" to a treaty was undertaken here by Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden. ***Multilateral Treaties Deposited with the Secretary General*** Status as of 31 December 1994, U.N. Doc. ST/LEG/SER. E/13 (1995) at http://untreaty.un.org

that, despite it's attempted "reservation" to Art. 6.5, the Senate explicitly recognized "U.S. acceptance of the jurisdiction of the Human Rights Commission under article 41 in which a State Party claims that another State Party is not fulfilling its obligations under the (ICCPR)." 138 Cong. Rec.S. 4783, 4784. The HRC, as detailed, fully concurs with our European treaty partners that the "reservation is void"

13. The Senates reservation to Art. 6.5 also is invalid because it conflicts with Treaty law as interpreted by the United States Supreme Court. That Court long has held that, "as treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'" Santovincenzo v. Egan, 285 U.S. 30 at 40 (1931) (citing cases). A Senate "reservation" which is invalid under international law has no independent validity in United States law, as the invalid reservation is not part of a treaty. See Stefan Riesenfield and Frederick Abbott, The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties, 67 CHI. KENT L.REV. 571, 589 (1992).

Indeed, the Supreme Court has held that where the Senate attaches Amendments to a treaty that were not part of the original treaty and not communicated to the other party ***as*** part of the treaty, the treaty remains valid, ***without*** the purported amendments:

> There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or Indian tribe, a material provision of which is unknown to one of the contracting parties. . . .

New York Indians v. United States, 170 U.S. 1, 23, 18 S.Ct. 531, 536 (1898).

As the Court recently noted, the relevant question " in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the

legislature of a single one of them, thought it agreed to." United States v. Stuart, 489 U.S. 353, 375, 109 S.Ct. 1183, 1195 (1989) (Scalia, J. concurring)

14. The text of the ICCPR, ***absent*** the Senate's reservation, which is utterly inconsistent with the treaty's clearly stated terms, is "what the sovereigns agreed to". Our own law requires that the ICCPR be enforced as written, including article 6.5, without the Senate's reservation, which simply is severable from its ratification of the treaty. This is the lesson of New York Indians and Stuart. Senate amendments and modifications to treaties that violate international law lack legal significance; the treaty remains in effect ***absent*** the reservation.

15. The HRC General Comment cited at para. 11.4 herein also dictates, and the United Nations Special Rapporteur (Appendix "3", at para. 32, 104) independently also determined, that the United States reservation to Article 6.5 is severable, so that the treaty is fully operative in the United States.

16. The Senate also did not make its "reservation" an essential condition of the United States' accession to the treaty, and reservations that are not an express condition of accession to a treaty are deemed severable at any rate, and do not implicate a party's intent to be bound. See Belios v. Switzerland, 132 Eur. Ct. H. R. (1998). The fact that the United States subsequently (in 1995) signed another multilateral treaty- - the Convention on the Rights of the Child (hereinafter, the "CRC"), which contains the same juvenile death penalty prohibition - - also evidences that the United States did not consider its "reservation" to Article 6.5 of the ICCPR to be a condition of its ratification.

Thus the entire ICCPR remains in effect in the United States, including Article 6.5, and this nation is obligated to comply with all of the provisions of that treaty in good faith. See Article 26, Vienna Convention (Pacta Sunt Servanda: "Every treaty in force is binding upon the parties to it and must be performed by it in good faith.")

17. The Senate Foreign Relations Committee apparently understood that the Senate's "reservation" to Article 6.5 negated none of this nation's obligations under that treaty. Thus, upon adopting the ICCPR the Committee " recognize[d] the importance of adhering to international standard." Regarding "the imposition of the death penalty for crimes committed by persons below the age of eighteen", the Committee stated that change in various states' death penalty laws vis a vis juveniles might be appropriate and necessary" "to bring the United States into full compliance at the international level". 31 I.L.M. 645, 650 (1992). In turn, the then-current Administration promised our treaty partners that "judicial means" would be used to guarantee full compliance with the ICCPR. Id. at 657.

18. The Senate's purported "reservation" to Article 6.5 of the ICCPR also violates Article II, Section 2 of the federal Constitution, which vests in the President the exclusive "power, by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the Senate shall concur". The Senate's authority to provide "advice and consent" and to "concur" does not include the power to modify "by reservation" the provisions of a treaty made by the president. Cf. Clinton v. City of New York, 524 U.S. 417 (1998) (Line-item veto invalid because the Constitution does not authorize the President "to enact, to amend, or to repeal statutes".) See also Bowsher v. Synar, 478 U.S. 714 (1986); I.N.S. v. Chadha, 462 U.S. 919 (1983).

19. When it ratified the ICCPR, the Senate also enacted a resolution of "understanding" that the treaty's protections are not "self executing". Thus, the Senate purported to require additional legislation before the treaty would be enforceable by the Courts. This also violates not just the treaty's terms, but our federal Constitution.

The Constitution's Supremacy Clause, cited earlier, states that "all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any state to the Contrary notwithstanding." The Supreme Court repeatedly has affirmed that, without domestic legislation to implement treaty provisions, they are the law of the land. See, e.g., Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344 (1809); Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268, 272-73 (1909) (" a treaty by the express words of the Constitution, is the supreme law of the land, binding alike National and State courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights".) An express right of action is not necessary to invoke a treaty as a defense, because the treaty nullifies any inconsistent state law. See The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870); Kolovrat v. Oregon, 366 U.S. 187 (1961) (use of a treaty as defense to escheatment of property); Cook v. United States, 288 U.S. 102, 118 (1933); Patsone v. Pennsylvania, 232 U.S. 138, 145 (1914). Thus, unless the language of a treaty is muddled, or the treaty's terms "import a contract when either of the parties engages to perform a particular act", or the treaty itself calls for implementing legislation by its subject nation-states, treaties are deemed to be self-executing. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). See also

United States v. Percheman, 32 U.S. (7 Pet.) 51, 89 (1833); United States v. Raauscher, 119 U.S.407 (1886).

None of these conditions apply here. The language of Art. 6.5 is perfectly clear, contractual obligations are not the issue, and nothing in the ICCPR anticipates or requires enabling legislation before its terms become effective. To the contrary, at Art. 2.3 (b) the ICCPR specifically says that the Treaty is self-executing: "Any person claiming [entitlement to a remedy under the treaty] shall have his right thereto determined by . . . competent authority provided for by the legal system of the state."

20. By declaring – contrary to the treaty's express terms, and despite the clarity of its language—that this treaty was not self-executing, the Senate illegally interjects the House of Representatives into the treaty ratification process. If given effect, the Senate's "understanding" would deprive individuals of the ability to enforce rights guaranteed by treaty—the "supreme law of the land", pursuant to Article VI—unless the House passed enabling legislation. The framers of the Constitution excluded the House from the treaty ratification process, yet the Senate's "understanding" here would fully provide the House with *de facto* veto power over the treaty—i.e., by refusing to pass the appropriate enabling legislation, the house effectively "vetoes" the treaty.

For these reasons, the Senate's declaration that the ICCPR is non-self-executing is simply invalid. Indeed, such an interpretive declaration by the Senate would invade the prerogatives of the judiciary to "say what the law is" Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

I. Customary International Law

21. The existence of an international law norm prohibiting the death sentence for crimes committed by individuals less than eighteen years old is incontrovertible. This norm forms a portion of "customary international law", and serves to prohibit application of the death penalty in the instant matter. Even if the United States was not bound to bar the execution of juvenile offenders due to it's recited treaty obligations, customary international law would prohibit application of the death penalty in the instant matter.

22. Customary international law encompasses " the customs and usages of civilized nations". Independent of treaty law, it is federal law, therefore binding upon all courts within the United States despite the existence of state law to the contrary. See The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"). See also Restatement (Third) of Foreign Relations Law of the United States, Sec. 111, reporters' note 4 (1987) ("matters arising under customary international law also arise under 'the laws of the United States', since international law is 'part of our law'. . . and is federal law"); and Sec. 702 ("[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts".)

23. Indeed, international law, opinion and the context within the world community was expressly recognized as a source of consideration by the Supreme Court in Atkins v. Virginia, 122 S.Ct. 2242 (2002) when examining the constitutionality of capital punishment as applied to those with mental retardation. The Supreme Court

again cited international law and evolving norms in reaching and justifying its recent opinion, voiding criminal sanctions on consensual sodomy.[9] Most recently the Missouri Supreme Court followed the United States Supreme Court's lead in citing international law in the case of *Simmons v Roper.*[10] This case held that the execution of juveniles "violates the evolving standards of decency...and is prohibited by the Eighth Amendment to the United States constitution."[11] The Court cited and found "that the views of the international community have consistently grown in opposition to the death penalty for juveniles"[12] and that "Article 37(a) of the United Nations Convention on the Rights of the Child and several other international treaties and agreements expressly prohibit the practice".[13]

24. A customary international law norm must satisfy a two-pronged test in order to be deemed legally binding: (1) the norm must be adhered to in practice by most countries, and (2) those countries that follow the norm must do so because they feel obligated by a sense of legal duty ("opinion juris"). See Barry E. Carter and Philip R. Trimble, International Law (3d ed., 1999), at pp.134-138[14]. See also Article 38, Statute of the International Court of Justice, 59 Stat. 1005, 1060 (1945) ("the Court, whose function it is to decide in accordance with international law such disputes as are submitted to it shall apply . . . (b) international custom, as evidence of a general practice accepted as

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[9] Lawrence and Garner v. Texas, 123 S.Ct. 2472,2483, 156 L.Ed.2d 508, 524 (2003)
[10] Simmons v. Roper, No. SC84454, 2003 WL 22006834 (Mo. August 26, 2003)
[11] *Id*, at *13
[12] *Id*, at *11
[13] *Id*, at *11
[14] The International Court of Justice (ICJ) in Nicaragua v. U.S.A.(merits) (ICJ Rep. 1986, 14, at 97) similarly stated that customary international law is constituted by two elements, that objective, "state practice which is evidence by the long-term widespread compliance by many nations" and the subjective "opinion juris, in that nation-states believe that the law is not merely desired, but mandatory and required by international law". Connie de la Vega & Jennifer Brown, *Can United States Treaty Reservation Provide Sanctuary for the Juvenile Death Penalty?*, 32 USFL Rev. 756 (1998).

law. . . . "); Note, *Judicial Enforcement of International Law against the Federal and State Governments,* 104 HARV. L. REV. 1269, 1273 (1991).

25. Both prongs of the test for "customary international law" are satisfied by the combined weight of the principles and authorities recited herein, to wit:

The norm that prohibits the execution of juvenile offenders is embodied in Article 37 of the Convention on the Rights of the Child ("CRC"), a multilateral treaty adopted in 1989 by the United Nations General Assembly and signed without reservation by Secretary of the State as the President's designee in 1995. This treaty, attached as Appendix "4", has been ratified by 191 of the world's 193 nation states. Until recently, the United States and Somalia were the only two countries that had failed to ratify the CRC[15]. However, on May 9, 2002, Somalia, which had not had a working central government for more than a decade, signed the CRC. At the United Nations General Assembly Special Session on Children, Somalia also stated its intention to ratify the Convention.[16] When it does so, it will be the 192nd party, and the United States will be the only country not to have adopted the norm against juvenile executions through ratification of the treaty.[17] Indeed the Inter-American Commission on Human Rights noted that the "extent of ratification of this instrument alone constitutes compelling evidence of a broad

[15] The Report of the Secretary General, UN ESCOR, Economic and Social Council, Subst. Sess., Un Doc E/2003 at 21 para. 90 (2002); Amnesty International, *Children and the Death Penalty(Nov. 2000)* (www.amnesty.org) , attached hereto, and referred to herein as Appendix "5". See also Amnesty International, *United States of America, Shame in the 21st Century- Three child offenders scheduled for Execution in January 2000* (December 1999)

[16] Amnesty International. *United States of America, Indecent and Internationally Illegal: The Death penalty against Child Offenders.*(Abridged version) (September 2002, at 24)

[17] Amnesty International, *The Death Penalty Worldwide* (2002)

consensus on the part of the international community repudiating the execution of offenders under 18 years of age.[18]

26. Aside from the ICCPR and the CRC, the international law against executing juvenile offenders is also expressed in at least two other multilateral treaties that the United States has signed and/or ratified: the Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) at Article 68, Paragraph 4 (Art. 68.4), ratified by the United States in 1955; and the American Convention on Human Rights (ACHR), at Chapter II, Art. 4.5, signed by the United States in 1977 but not yet ratified.

27. This norm against executing juvenile offenders has been expressed or agreed to by every international body that has commented upon it. The bodies of the United Nations officially and repeatedly have registered the position that the continued use of the death penalty against juveniles in the United States violates international law. The United Nations General Assembly adopted the United Nations Economic and Social Council's resolution to implement safeguards to prevent the juvenile death penalty, see *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ESC.* Res 1984/50, annex, 1984 UN ESCOR Supp. (No 1) at 33, UN Doc E/1984/84 (1984). In 1985, the United Nations General Assembly adopted, by consensus, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice,* which also opposed capital punishment for juvenile offenders. (GA res 40/33, annex, 40 UN GAOR Supp. (No. 53) at 207, UN Doc A/40/53 (1985).

28. In 1998, the United Nations Special Rapporteur on Extrajudicial, Summary

[18] Inter-American Commission on Human rights, Organization of American States, Report No. 62/02, *Michael Domingues, United States,* October 22,2002. Report Discussed Infra.

of Arbitrary Executions also issued a report that repeatedly acknowledged that customary international law recognizes a "clear. . . prohibition" to the execution of people who were under the age of 18 at the time of the offense. The report noted that this norm is "reflected in the wide range of international legal instruments". See Report of Special Rapporteur (Appendix "3"), paras. 24, 49, 50, 55.

29. Since 1997, the United Nations Commission on Human Rights has passed resolutions calling on states to abolish the death penalty in general, but has specifically asked nations "not to impose it for crimes committed by persons below 18 years of age"[19]. These resolutions passed with a number of dissenting votes, which can be attributed to the fact that the resolutions call for a general moratorium on the death penalty as a whole, a number of nations still employ capital punishment, which is not prohibited by the International Covenant, and the general prohibition is not widely accepted. However, in contrast, Commission resolutions mentioning only the prohibition against the juvenile death penalty have passed by consensus without a vote. See Rights of the Child, Comm. On Hum. Rts. 57th Sess., Resolution 2001/75, adopted April 25, 2001, E/CN.4/2001/RES/75 para. 28 (a)(2001) (Appendix "6"). This was further affirmed in 2002 and 2003. See *Rights of the Child*, Com. On Hum. Rts, 59th Sess., Resolution 2003/86 Doc.E/CN.4/Res/2003/86, *Rights of the Child,* Com. On Hum. Rts. 58th Sess., Resolution 2002/92 UN Doc.E/CN.4/Res/2002/92,. In 2002, the United Nations Commission on Human Rights also incorporated the prohibition against the

[19] See *The Question of the Death Penalty*, Comm. On Hum. Rts. 59th Session, Resolution 2003/67 adopted April 24, 2003, UN Doc. E/CN.4/RES/2003/67_ *The Question of the Death Penalty*, Comm. On Hum. Rts., 58th Sess. Resolution 2002/77, adopted April 25, 2002, E/CN.4/2002/Res/77, *The Question of the Death Penalty*, Comm. On Hum. Rts., 56th Sess, Resolution 2000/65, adopted April 25, 2001, E/CN.4/2001/Res/65 (2001), *The Question of the Death Penalty*, Comm. On Hum. Rts., 56th Sess, Resolution 2000/65, adopted April 27, 2001, E/CN.4/2001/Res/68 (2001) *The Question of the Death Penalty*, Comm. On Hum. Rts., 55th Sess, Resolution 1999/61, adopted April 28, 1999, E/CN.4/1999/Res/61 (1999), *The Question of the Death Penalty*,

juvenile death penalty into the *Resolution on Human Rights in the Administration of Justice, in Particular Juvenile Justice*, E/CN/2002/47.

30. The United Nations Sub-Commission on the Promotion and Protection of Human Rights has passed similar resolutions. In 1999, the United States was specifically mentioned as one of six nations that had executed juvenile offenders since 1990, and as having accounted for 10 of the 19 executions during that time period in the resolution, *The Death Penalty Particularly in Relation to Juvenile Offenders*, United Nations Sub-Committee on the Promotion and Protection of Human Rights, 52nd Sess., Res. 1999/4. adopted August 24, 1999, UN Doc. E/CN.4/SUB.2/RES/1999/4 (1999). One year later, in August, 2000 the sub-commission adopted Res. 2000/17, *The Death Penalty In Relation to Juvenile Offenders*, UN Doc. E/CN.4?sub.2/RES/2000/17 (2000). This resolution, attached as Appendix "7", also confirms "the imposition of the death penalty on those aged under 18 at the time of the commission of the offense is contrary to customary international law". It requests that governments comply with the mandates of Article 37 of the CRC, and Article 6(5) of the ICCPR. Bluntly stating (as did the Special Rapporteur) that ". . . the imposition of the death penalty upon those age under 18 at the time of their offense is contrary to customary international law," the resolution goes on to

> Call upon all States that retain the death penalty for juvenile offenders to abolish by law as soon as possible the death penalty for those aged 18 at the time of the commission of the offense and, in the meantime, to remind their judges that the imposition of the death penalty against such offenders is in violation of international law.

Id.

Comm. On Hum. Rts., 54th Sess, Resolution 1998/8, adopted April 3, 1998, E/CN.4/1998/Res/8 (1998), *The Question of the Death Penalty*, Comm. On Hum. Rts., 53rd Sess, Resolution 1997/12, adopted April 3, 1997, E/CN.4/1997/Res/12 (1997).

31. In addition to these. The members of the international community have expressed their opinion on numerous occasions in relation to the execution of juveniles and international legal obligations. The Council of Europe and the European Union, as well as individual countries have intervened on several juvenile cases:

The Council of Europe noted that its 43 member states opposed the death penalty in all circumstances, and made the following observances regarding Mr. Napoleon Beazley's case in particular:

> The case of Napoleon Beazley is particularly distressing, since it is reported that he was a minor at the time of the crime. His execution would not only flout Resolution 2001/68 adopted by the UN Human Rights Commission on 25 April 2001 but would also contravene international legal standards, including those drawn up by the Council of Europe.[20]

Similar observations were also made by the Council of Europe in regard to Ronald Chris Foster. Further, the Council of Europe emphasized the status of the United States as an observer to the organization and that it was correspondingly, "deemed to share the same fundamental values and principles."'[21]

32. The European Union's message was similar, a plea based upon the international human rights treaties and "generally accepted human rights norms" asking the United States (Texas) to commute Mr. Beazley's sentence so as to comply with international law.[22]

The government of Switzerland emphasized in its letter to Governor Rick Perry, that Article 6 of the International Covenant on Civil and Political Rights "reflects the

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[20] Letter from Walter Schwimmer, Secretary General, Council of Europe, to Gerald Garrett, Chairperson of the Texas Board of Pardons and Paroles (with copy to Texas Governor Rick Perry), July 23, 2001.

[21] Letter from Walter Schwimmer, Secretary General, Council of Europe, to Mississippi Governor Ronnie Musgrove. 16 December 2002

minimum rules under customary international law for the protection of life regarding juveniles, which cannot be altered through unilateral declarations."[23] The Government of Norway officially intervened on Mr. Beazley's behalf urging that a commutation be granted because of his age at the time of the offense.'[24] In 2002, the Government of Mexico submitted a letter to the Board of Pardons and Paroles, as a co-Party to the International Covenant on Civil and Political Rights, urging Texas not to breach Article 6(5) of that instrument by continuing to seek to execute Mr. Beazley.[25] Similarly on December 24, 2002, the Government of Mexico reiterated its position on the impending execution of Ronald Chris Foster:

> ..The Government of Mexico is deeply disturbed by the fact that Mr. Foster was only 17 years old at the time of the crime. Within the international community the execution of juvenile offenders is widely regarded as contrary to established norms of customary international law. In addition the execution of a juvenile offender, such as Mr. Foster, would violate article 6 of the ICCPR, a treaty to which the United States is a party.....on behalf of the Government of Mexico, I respectfully urge you, to consider the position of the international community and... commute Mr. Foster's sentence... in accordance with international law.[26]

33. In continuing to execute juveniles, the United States acts in defiance of substantial international consensus and law. The universal nature of this prohibitive, customary international law norm is evident from the ratification by 191 nation-states of the CRC, and from the widespread ratification of the

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[22] Letter from Alex Reyn, Ambassador of Belgium (former President of the E.U.), to Gerald Garrett, Chairperson of the Texas Board of Pardons and Paroles, July 20, 2001.
[23] Letter from Alfred Defago, Ambassador of Switzerland, to Gov. Rick Perry, July 16, 2001.
[24] Norwegian Ministry of Foreign Affairs press release, August 2, 2001.
[25] Letter from Juan Jose Bremer, Ambassador of Mexico, to Governor Rick Perry, dated May 3, 2002. Ambassador Bremer writes, "It is important to emphasize that Mexico has great respect for the judicial system in the United States. Nevertheless, as a responsible member of the international community and as a party to the International Covenant on Civil and Political Rights, Mexico has a legitimate interest in promoting respect for norms of international law. On behalf of the Government of Mexico, I respectfully urge you to consider the position of the international community and to exercise all powers vested in your office to commute Mr. Beazley's sentence to any penalty other than capital punishment, in accordance with international law."
[26] Letter from Mario Chacon, Charge d'Affaires, to Governor Musgrove, December 24, 2002

ICCPR and other treaties that prohibit juveniles from being subjected to the death penalty. It is further apparent from many (traditionally supportive) nation-states' condemnation of the ongoing execution of juveniles in the United States and evidenced by the virtual cessation of juvenile executions throughout the world, except in a few states of the United States.

34. Since 1990, only seven countries have reportedly executed juvenile offenders: Iran, Saudi Arabia, Nigeria, the Democratic Republic of Congo (DRC), Yemen, Pakistan and the United States. In the last three years, the small number of nations known to have executed such offenders has further declined to only four: the DRC, Iran, Pakistan and the United States. In fact, in the year 2002 only the US had reportedly executed a juvenile offender.

In 1994, Yemen changed its law to prohibit the execution of juveniles. In December 1999, the DRC called for a moratorium on all executions. In January 2000, a 14 year-old child soldier was executed in the DRC. Since that time however, according to OMCT-World Organization Against Torture, four juvenile offenders sentenced to death in the DRC in a military court were granted stays and the sentences were commuted following an appeal from the international community (Case COD 270401.1.CC, 31 May 2001, OMCT-World Organization Against Torture). The Nigerian government stressed to the UN Sub-Commission that the execution, which took place in 1997, was not of a juvenile (See Summary Record of 6th Meeting of the Sub-Commission on the Promotion and Protection of Human Rights, 52nd Sess., 4th August, 2000, E/CN.4/Sub.2/2000/SR.6 para.39 (2000)). Saudi Arabia emphatically denies the 1992 execution of a juvenile (See

Summary Record of the 53rd Meeting of the Commission on Human Rights, 56th Sess., April, 17, 200, E/CN.4/2000/SR.53, paras 88 and 92).

In July 2000, Pakistan moved to outlaw the execution of juvenile offenders under the Juvenile Justice System Ordinance. On 3 November 2001, Pakistan executed Ali Sher for a crime he committed at the age of 13. Since this execution, however, President Musharrah of Pakistan commuted the death sentences of approximately 100 young offenders to imprisonment. This shift away from the juvenile death penalty is supported by the Supreme Court of Pakistan's decision on March 26, 2003 to "peruse and define laws relating to "the imposition of the death sentence (on) young people."[27]

Of the six countries, other than the US, that have reportedly executed juvenile offenders, all have either changed their laws or the governments have denied that the executions took place.

In continuing, what is increasingly seen as a barbaric and uncivilized practice, the United States has, over the last decade, executed more juveniles than every other nation of the world combined. Indeed, reportedly, the U.S. is, reportedly, the only country in the world to have executed juvenile offenders since November, 2001.[28]

35. It is beyond question that the overwhelming majority of known executions of children are in the United States, where a few states stand-alone in the world as

[27] International Justice Project: http://www.internationaljusticeproject.org/juvInstruments.cfm

[28] Even in the US, of the 38 states that retain capital punishment, 16 explicitly prohibit the execution of juveniles. Of the remaining 22 states, 16 have never actually executed a juvenile offender and, of those, seven have never even put a juvenile on death row. Since 1993, all juvenile executions in the United States have been carried out either in Texas (8), Virginia (3), or Oklahoma (2). Further, neither the Federal government nor the military allow for the execution of juvenile offenders, despite the retention of capital punishment. See, http:// www.intenationaljusticeproject.org/juvStats.cfm

governmental entities which defy this norm, which is adhered to in practice by most nations due to a sense of legal duty. Demonstrably, it is rule of customary international law.

Persistent Objector

36. A nation-state may avoid being bound by a rule of customary international law only if it has been a "persistent objector" to the norm or rule. Objection to the norm must be "consistent" and, irrespective of disagreement, if an objecting state even has simply signed a treaty that covers the issue to which it then objects, it is not a "persistent objector." See The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework, 2 U.C. DAVIS J.INT'L.L.& POL'Y. 147, 163 (1996).

The United States' objection to the international law norm at issue here certainly has not been consistent, and this nation has signed numerous international instruments that embody the norm.

Thus, the United States ratified the Fourth Geneva Convention without objecting to the norm. It signed the American Convention on Human Rights without objecting to the norm. It signed the Convention on the Rights of the Child without objecting to the norm. It participated in the framing of the ICCPR and signed it without objecting to the norm; indeed, it even jointly sponsored a United Nations General Assembly resolution that Article 6 of the ICCPR, which embodies the norm, establishes a "minimum standard" for all member states, whether or not they had adopted that treaty! G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N.Doc.

A/35/48 (1980).

The Senate's purported "reservation" to Art. 6.5 of the ICCPR during its ratification process notwithstanding, the United States certainly may not now make any "persistent objector" claim. As is every other nation of the world, the United States is bound by this recited customary rule of international law.

III The International Bar on Juvenile Executions Has Attained *Jus Cogens* Status as Detailed by the Court in *Domingues*

37. Even if the United States would or could claim that it had been a persistent objector to the prohibition against executing juvenile offenders, it still could not exempt itself from this norm, which is now non-derogable.[29] The treaties, pronouncements, and practices cited in the foregoing paragraphs demonstrate that the prohibition against executing juveniles has become as widespread and unquestionable as have the prohibitions against slavery, torture, and genocide. There are no contrary expressions of opinion by any country, nor by agency charged with the enforcement and interpretation of the within-cited documents. Except for a handful of States within these United States, the global consensus on this point is absolute. The overwhelming application of the norm has rendered it *a jus cogens* norm -- that is, a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same

[29] This *jus cogens* norm would be binding on the United States even if the United States had been a persistent objector. *See Case of James Roach and Jay Pinkerton,* Case No. 9647, Inter-Am. C.H.R., 61, 78, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987). The U.S. was not a persistent objector while the norm was evolving. The United States' failure to consistently dissent is not relevant to compliance with the *jus cogens* norm, which brooks no dissent.

character." See Vienna Convention on the Law of Treaties, 8 I.L.M. 679, 1155 U.N.T.S. 331 (adopted May, 1969, entered into force January 27, 1980), Art. 53 (hereinafter, "Vienna Convention")(Attached as Appendix "5")[30]. In other words, the norm describes such a bare minimum of acceptable behavior that *no* nation may derogate from it.

A norm must meet four requirements in order to attain the status of a peremptory norm: 1) it is general international law, 2) it is accepted by a large majority of states; 3) it is immune from derogation; and 4) it has not been modified by a new norm of the same status. The prohibition against the execution of offenders who were under 18 at the time of their offense clearly meets those requirements.[31]

A. *The Prohibition is General International Law*

First, the prohibition against the execution of persons who were under 18 years of age at the time of their offense (juvenile offenders) is general international law. Numerous treaties, declarations and pronouncements by international bodies, as well as the laws of the vast majority of nations, are evidence of the general international law prohibition and have been discussed supra.

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[30] The United States has not yet ratified the Vienna Convention, a "treaty designed to govern all other treaties," but has taken the position that it is an authoritative guide to existing treaty law. See Nicholls, *Too Young To Die: International Law and the Imposition of the Juvenile Death Penalty in the United States, 5* Emory Int'l.L.Rev. 617, 639 (1991).

[31] The Convention "permeates the whole body of international regulation and creates the fundamental framework within which this regulation operates." Maria Frankowska, The Vienna Convention on the Law of Treaties Before the United States Courts, 28 Va.J.Int'l.L. 281, 286 (1998). On a number of occasions the Department of State also has acknowledged that it regards particular articles of the Convention as codifying existing law. Id. And the American Law Institute, in revising the Restatement of the Foreign Relations Law of the United States, took the Vienna Convention as its "black letter" for setting out principles related to the law of treaties. Id.

B. The Prohibition is Accepted by All States Except One

39. The second requirement for *a jus cogens* norm is satisfied in that the norm is accepted "by a very large majority of States, even if over dissent by `a very small number' of states."[32] The United States is the only state in the Organization of American States that currently imposes the death penalty for persons under the age of 18 and the only country in the world that has not accepted the international norm against the execution of juvenile offenders. The only other countries known to have executed juvenile offenders in the last ten years have since abolished the practice, acknowledge that such executions were contrary to their laws, or deny that they have taken place.

Hence, only the United States has not accepted the norm against the execution of juvenile offenders. This norm has clearly attained peremptory status and is similar to those noted in the Restatement (Third)[33]. Such norms include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights.[34] The United States courts have accepted other international norms (for example, the prohibition against torture). [35] Amnesty International has found, however, that 125 countries violated the *jus cogens* norm against torture in 2000.[36] In stark contrast, only three countries violated the norm prohibiting the execution of juvenile offenders in the past couple of years, indicating the widespread importance of

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[32] Restatement (Third) of Foreign Relations Law § 102, reporter's note 6 (interpreting the Vienna Convention, *supra* note 13, and citing to Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72).
[33] *See supra* text accompanying note 4.
[34] Restatement (Third) of Foreign Relations Law § 102, and reporter's note 6 (1986).
[35] *See, e.g., Siderman de Blake v. Republic of Argentina,* 965 F.2d 699 (9th Cir. 1992); *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo,* 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-idason,* 672 F. Supp. 1531 (N.D. Cal. 1987).
[36] Amnesty International Report 2001, Annual Summaries 2001, AI Index: POL 10/006/2001.

this norm. Yet a few states within the United States refuse to abide by it. (Since 1994, only Texas, Oklahoma, and Virginia have executed juvenile offenders).

C. The Prohibition is a Non-Derogable Norm

40. The prohibition is non-derogable. The ICCPR expressly provides that there shall be no derogation from Article 6, which prohibits the imposition of the death penalty on juvenile offenders.[37] The express prohibition in the treaty coupled with the wide acceptance, evidenced by treaties, resolutions, national laws, practice and the reiteration by numerous sovereign nations to which the United States is bound by treaty, support the conclusion that the norm is non-derogable.

D. There is no Emerging Norm Modifying this Norm

41. As to the fourth and final requirement, there is no emerging norm that contradicts the current norm. The prohibition of the juvenile death penalty has been universally accepted by all but one country. There is thus no question that the prohibition against the execution of persons who were under 18 at the time of their offense has attained the status of a universal (not merely regional) *jus cogens* norm.

42. Indeed, such status was recently recognized in the October 22, 2002,

[37] International Covenant on Civil and Political Rights, *supra,* at art. 4(2).

opinion of the Inter-American Commission on Human Rights in the case of Michael Domingues, a Nevada inmate sentenced to death for an offense that occurred when he was 16 years old. [38] The Commission held that the customary international law bar on the death penalty for crimes committed by persons under age 18 has attained *jus cogens* status.[39] That means, succinctly, that the Commission found the United States to be violating a "superior order of legal norms" derived from "fundamental values held by the international community," the breach of which "shock the conscience of humankind," and which "bind the international community as a whole, irrespective of protest, recognition or acquiescence."[40] Unlike the practice of seeking the death penalty for persons with mental retardation, the United States' and thus Virginia's use of the death penalty for juvenile offenders is not only inconsistent with international practice, but with the most fundamental of international law peremptory norms. The Commission's decision is the first by any international court, commission, or other international body responsible to interpret and apply international human rights norms that has held the bar on the juvenile death penalty to meet the *jus cogens* definition. The Commission's decision at the very least should be persuasive authority for this Court's treatment of the issue as a highly significant development in articulating international law. That the Inter-American Commission on Human Rights has found the ban on the executing juvenile offenders to be a norm of jus cogens must surely be relevant to this court's determination of whether execution of such offenders violates the "Supreme Law of the Land" and contravenes evolving standards

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[38] Inter-American Commission on Human Rights, Organization of American States, Report No. 62/02, Merits Case 12.285, ***Michael Domingues, United States,*** October 22, 2002. *See* **Appendix Exhibit 8**, pp. A143-A187
[39] *Id,* at para 112
[40] *Id,* at para. 49

of decency.

43. In the alternative, a persuasive argument can be made that the Inter-American Commission's decision in *Domingues* is in fact *legally binding* on the United States and Virginia, based upon the United States' treaty responsibilities under the Charter of the Organization of American States. The United States was a founding member of the Organization of American States (OAS) and an active participant in the 1948 conference at which both the OAS Charter and the American Declaration on the Rights and Duties of Man were adopted. Since that time, the United States has participated in each step of the development of the Inter-American system of human rights. The Inter-American system of human rights enforcement and promotion is central to the role of the OAS, and the Commission and the American Declaration are integral parts of that system. The United States ratified the OAS Charter in 1951. [41]

44. The Inter-American Commission was created in 1959 as an autonomous entity of the OAS to promote and protect human rights. In 1967, amendments to the OAS Charter made the Commission a principal organ through with the OAS was to accomplish its purposes. Amended Charter, Art. 51[42]. The amended OAS Charter specifically provided that "[t]here shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." *Id.* at Art. 112. The United States signed the amendments to the OAS Charter in 1967 and ratified them without reservation in 1968.[43]

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[41] 2 U.S.T. 2349, T.I.A.S. No. 2361, 119 U.N.T.S. 3. Also available at www.oas.org/juridico/english/charter.html. The United States ratified the OAS Charter subject to one reservation that is not relevant here.

[42] The Charter was amended pursuant to the Protocol of Buenos Aires, 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847, Feb. 27, 1970

[43] *See* 721 U.N.T.S. 324, 21 U.S.T. 607, T.I.A.S. No. 6847.

45. Thus, with the full consent and ratification of the United States, the Commission acquired an express role under the OAS Charter to promote and protect human rights within the Inter-American system. In addition, the United States consented to the Commission's power to hear individual petitions against OAS member states and to determine whether human rights protected by the American Declaration have been violated.[44] As a consequence, the United States has recognized the Commission's authority to promote and protect the human rights that the United States is treaty-bound not to infringe. It would be contrary to the treaty, in this case the OAS Charter, for the United States and Virginia to undermine the Commission by refusing to give effect to its findings that the American Declaration has been violated in the *Domingues* case and identically situated inmates. As noted in *Domingues,* the Commission has determined that "the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights."[45]

Conclusion

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[44] The United States has acknowledged and consented to the Commission's authority to adjudicate disputes involving member states' adherence to the Inter-American system of human rights, including specifically the Article of the American Declaration found to have been violated in ***Domingues. Domingues,*** at para. 112 (the *jus cogens* norm as reflected in Article I, protecting the right to life). The federal government has admitted that:

> under the Charter of the OAS, the Commission has of course the competence and responsibility to promote observance of and respect for the standards and principles set forth in the [American] Declaration. The United States has consistently displayed its respect for and support of the Commission in this regard, *inter alia,* by responding to petitions presented against it on the basis of the Charter and the Declaration.

Andrews v. United States, Case 11.139, Inter-Am.C.H.R. 570; OEA/ser.L/VI/II.98. doc 7 rev. (1996); ***see also Roach & Pinkerton v. United States,*** **Case** 9647, Inter-Am. C.H.R. 147, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987).

[45] *Domingues,* at para. 30 ("Commission's Competence") & n. 14 (citing Commission decisions).

46. In an age of increasing global cooperation in areas ranging from travel and trade to common security and defense, continued juvenile executions violate international law, thus isolating the United States from the international community. The near unanimous position of the world community supports the legislative and other trends in this country showing a consensus against the execution of juveniles. It is no small irony that this nation, which in many respects holds itself out as the paragon of civil and individual rights, is the only nation on earth where governmental authorities openly endorse and engage in this universally condemned practice.

Because execution of any person who was less than eighteen years old at the time of his alleged crime violates settled international law, the Commonwealth of Virginia may not seek the death penalty upon defendant Lee Malvo.

Respectfully submitted,

LEE BOYD MALVO

Co-Counsel

and

Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
8001 Braddock Road
Suite 105
Springfield, Va 22151
703-323-1200
703-978-1040 (Fax)
VSB No. 20999

Craig S. Cooley, Esquire
3000 Idlewood Avenue
P. O. Box 7268
Richmond, VA 23221
804-358-2328
804-358-3947 (Fax)
VSB No: 16593

CERTIFICATE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed first class mail to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

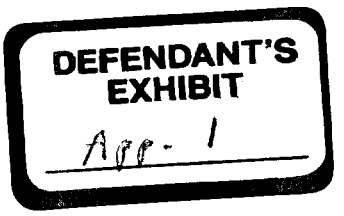
and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
City of Chesapeake Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 29 day of August, 2003.

Co-Counsel

Co-Counsel



International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

Ratification Information

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article I

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people

be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a

judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their

age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee

to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV *Article 28*

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1 . The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and

exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1.

(a) If a matter referred to the Committee in accordance with article 41 is not

resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information. 7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46.

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General

Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

HOME TREATIES SEARCH LINKS

Human Rights Committee, General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).1

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties. Is it important for States Parties to know exactly what obligations they, and other States Parties, have in fact undertaken. And the Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.

2. For these reasons the Committee has deemed it useful to address in a General Comment the issues of international law and human rights policy that arise. The General Comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States Parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States Parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a States's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. 2 Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime". Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(3) of the Vienna Convention on the Law of Treaties provides relevant guidance. 3 It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (Article 2(1) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is

irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the prohibition of torture and arbitrary deprivation of life are examples. 4 While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State's party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognise the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive

obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14 The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence ratione temporis. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty. 5 It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon State parties wishing to avail themselves of such a reservation. Article 2, paragraph 1, obliges such a State to inform the Secretary General, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare. This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect. Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary General of the beginning or ending of a state of war applicable to its territory. In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the *Reservations to the Genocide Convention Case* (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to

reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to the presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical,

with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdrawn reservations.

Footnotes

1. Adopted by the Committee at its 1382nd meeting (fifty-second session) on 2 November 1994.

2. Article 2(1) (d), Vienna Convention on the Law of Treaties 1969.

3. Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in The Reservations to the Genocide Convention Case of 1951.

4. Reservations have been entered to both article 6 and article 7, but not in terms which reserve a right to torture or arbitrary to deprive of life.

5. The competence of the Committee in respect of this extended obligation is provided for under article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Extrajudicial, summary or arbitrary executions

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61

Addendum

Mission to the United States of America

CONTENTS

Introduction

1. The **Special** Rapporteur on extrajudicial, summary or arbitrary executions visited the United States of America from 21 September to 8 October 1997. The visit took place following several requests by the **Special** Rapporteur to the United States Government for an invitation. By letter dated 23 September 1994, the **Special** Rapporteur inquired whether the Government of the United States would consider inviting him to carry out a visit. By letter dated 25 September 1995, the **Special** Rapporteur reiterated his request. By letter dated 2 September 1996, the **Special** Rapporteur expressed concern that no reply had yet been received to his previous communications of 1994 and 1995 and reiterated his interest in conducting a mission to the United States. The invitation to visit the country was given orally to the **Special** Rapporteur on 8 October 1996 during a meeting held in Geneva with representatives of the Permanent Mission of the United States. The invitation was confirmed in writing by letter dated 17 October 1996.

2. The request for a visit to the United States was based on persistent reports suggesting that the guarantees and safeguards set forth in international instruments relating to fair trial procedures and specific restrictions on the death **penalty** were not being fully observed. Since his appointment in 1992, the **Special** Rapporteur has received information concerning a discriminatory and arbitrary use of the death **penalty** and a lack of adequate defence during trial and appeal procedures in the United States. Executions of juveniles and mentally retarded persons have also been a constant concern for the **Special** Rapporteur. In addition, information concerning the extension of the scope and the

reintroduction of death **penalty** statutes in several states prompted the **Special** Rapporteur to request a visit to the United States.

3. The basis for the **Special** Rapporteur's work in the field of capital punishment lies in several resolutions of the Commission on Human Rights in which the Commission requested the **Special** Rapporteur "to continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of the death **penalty**, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto"

4. Although the main concern of the **Special** Rapporteur in requesting a visit to the United States was the application of the death **penalty**, other aspects of his mandate could not be ignored, in particular because reports of deaths in custody and deaths due to excessive use of force by law enforcement officials in the United States were also received by the **Special** Rapporteur.

5. From 21 September to 8 October 1997, in addition to Washington, D.C., the **Special** Rapporteur visited the States of New York, Florida, Texas and California. During his visit he met with federal and state authorities. In Washington, D.C. he met with the Deputy Assistant Secretary for Human Rights and other representatives of the Department of State, as well as with representatives from the Department of Justice, and several members of Congress. In New York, he met with the Chief Judge of the New York State Court of Appeals, the District Attorney for Bronx County, the Deputy Police Commissioner on Legal Matters and Representatives of the New York Capital Defenders Office. In addition, he also met with the former Governor of New York State, Mario Cuomo. In Florida, he met with the State Attorney, representatives of the Office of the Public Defender and the Chief of Police of Miami. During his stay in Texas, he held meetings with the Governor and his assistant on legal matters, representatives of the Office of the Attorney General in Austin and representatives of the Office of the District Attorney in Houston. He also met with the Consul of Mexico in Houston. In California, he met with the Court Administrator of the California Supreme Court, the San Francisco Assistant Chief of Police, as well as with the Chief of Police of Los Angeles. The **Special** Rapporteur wishes to thank state authorities, and particularly former Governor Cuomo and Governor Bush, for their availability and cooperation with his visit.

6. The **Special** Rapporteur met with prison authorities in Huntsville, Texas, and in San Quentin, California. He had full access to the Ellis Death Row Unit in Huntsville and was able to meet with all the death row inmates he had requested to meet. In San Quentin, prison authorities offered the **Special** Rapporteur the possibility of meeting with three death row inmates other than those he had requested to see. The **Special** Rapporteur did not consider those conditions acceptable and therefore declined the offer. He nevertheless visited the premises of the prison. His repeated requests to visit women on death row in Broward Correctional Institution, Florida, remained unanswered.

7. In addition, the **Special** Rapporteur had the opportunity to meet with many non-governmental sources, including lawyers representing persons on death row, victims' families, experts on death **penalty** issues, specialists on juvenile justice and mental retardation, university professors and criminologists. He also met with representatives of non-governmental organizations such as the American Civil Liberties Union, the American Friends Service Committee, the Anthony Baez Foundation, Amnesty InternationalUnited States Section, the Death **Penalty** Information Center, the December 12th Movement, the California Appellate Project, the Ella Baker Center for Human Rights, Human Rights Watch, the International Human Rights Law Group, the International Association against Torture, the National Coalition to Abolish the Death **Penalty**, the NACCP Legal

Defense Fund, New York Lawyers Against the Death **Penalty**, Parents Against Police Brutality, the Southern Region Rainbow Coalition, the Texas Coalition to Abolish the Death **Penalty** and the Texas Defender Service.

8. The **Special** Rapporteur wishes to thank the International Human Rights Law Group in Washington, D.C. for the assistance provided during his mission. Further, he would like to express his gratitude to Human Rights Watch, whose assistance in the organization of appointments at a non-governmental level was highly appreciated. He also wishes to thank the December 12th Movement for organizing public hearings on police violence in New York, as well as those NGOs and individuals who publicly testified during the hearing.

9. Despite the official invitation from the United States Government and its agreement on the dates, many difficulties arose in the organization of official meetings for the mission. The Department of State was only willing to provide assistance in arranging meetings at the federal level, but maintained it had no authority to facilitate the visit at state level. The **Special** Rapporteur regrets that none of the highlevel meetings he requested at the federal level were arranged. In view of the above, he transmitted a letter dated 18 September 1997 to the United Nations High Commissioner for Human Rights expressing his concern at the obstacles his mission was facing. Official meetings at the state level were organized by the Office of the High Commissioner for Human Rights in Geneva and New York as well as by the United Nations Information Center (UNIC) in Washington, D.C.

10. The **Special** Rapporteur wishes to thank the Department of State for its efforts in trying to facilitate access for him to state prisons. Thus, by letters dated 22 September 1997, the Department of State requested prison authorities at Broward Correctional Institution in Florida, Huntsville in Texas, and San Quentin in California to cooperate with the visit of the **Special** Rapporteur. [**back to the contents**]

I. THE RIGHT TO LIFE IN INTERNATIONAL LAW

11. The right to life is the supreme right, because without it, no other rights can be enjoyed. International law recognizes the right to life as a fundamental and non-derogable right. The death **penalty** is an exception to the right to life and, like any exception, it must be interpreted restrictively and carried out with the most scrupulous attention to fundamental principles of non-discrimination, fair trial standards and equal protection before the law. There is no right to capital punishment, and while Governments have the right to enact penal laws, these laws must conform to basic principles of international human rights law.

12. The supremacy of the right to life and the exceptional character of the death **penalty** are enshrined in several international instruments. Article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights (ICCPR) provide that every individual has the right to life and security of the person, that this right shall be protected by law and that no one shall be arbitrarily deprived of his or her life.

13. Although the death **penalty** is not yet prohibited under international law, the desirability of its abolition has been strongly reaffirmed on different occasions by United Nations organs and bodies in the field of human rights, inter alia by the Security Council, the Human Rights Committee, the General Assembly and the Economic and Social Council.

14. Another recent indication of the increasing trend towards abolition of the death **penalty** can be

seen in Commission on Human Rights resolution 1997/12 on the question of the death **penalty**. For the first time, the Commission on Human Rights adopted a resolution on capital punishment in which it called upon all States "that have not yet abolished the death **penalty** progressively to restrict the number of offences for which the death **penalty** may be imposed". It further called on States to consider suspending executions, with a view to abolishing the death **penalty**.

15. The gradual move within the United Nations to a position favouring the abolition of the death **penalty** was already observed in the reports on United Nations norms and guidelines in criminal justice: from standardsetting to implementation (A/CONF.87/8) and on capital punishment (A/CONF.87/9) presented to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980. The reports noted that the United Nations had gradually shifted from the position of a neutral observer, concerned about but not committed on the question of the death **penalty**, to a position favouring the eventual abolition of the death **penalty**.

16. Three treaties aiming at the abolition of the death **penalty** further confirm the tendency of the international community towards abolishing the death **penalty**: the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death **Penalty**; and the Protocol No. 6 to the European Convention on Human Rights.

A. The International Covenant on Civil and Political Rights: limitations on the imposition of the death penalty

17. The International Covenant on Civil and Political Rights and its first Optional Protocol, were adopted in 1966 by the General Assembly. The ICCPR came into force 10 years later, on 23 March 1976. By ratifying the ICCPR, a State accepts the obligation to give the force of law to the rights proclaimed by the Covenant. Civil and political rights enshrined in the International Covenant include, inter alia, the right to non-discrimination, the right to be treated equally before the law, the right to a fair trial, the right not to be submitted to torture, and the right to life. The object of the Covenant is the creation of minimum legally binding standards for human rights which, according to article 50 of the Covenant, shall extend to all parts of federal States without any limitation or exception. The United States of America ratified the ICCPR on 8 June 1992, with a package of reservations, declarations and understandings. On 8 September 1992, the treaty came into force for the United States.

18. Article 6 (1) of the ICCPR states that the right to life is an inherent right. The term "inherent right" was understood, during the drafting of the Covenant, as a right which is not conferred on a person by society but "rather that society is obliged to protect the right to life of an individual". It further stipulates that no one shall be arbitrarily deprived of his life. The concept of arbitrariness cannot be equated to "against the law", but has to be interpreted more broadly, to include the notion of inappropriateness and injustice. While the United States entered general reservations to article 6, no specific reservation was entered to article 6 (1) of the ICCPR (see paras. 27-35 below).

19. After setting out the general protection of the right to life, article 6 (2) indicates the conditions, in those countries where it has not been abolished, for imposing the death **penalty**. Article 6 (2), as an exception to the inherent right to life, should not be interpreted as authorizing the imposition of the death **penalty** in general, but only for those countries where it has not yet been abolished. It is the opinion of the **Special** Rapporteur that the negative wording of the article does not allow for the reinstatement of the death **penalty** after it has been abolished. The intent of this provision does not

allow for the expansion of the scope of the death **penalty**. In this context, the Human Rights Committee has expressed the view that the extension of the scope of application of the death **penalty** raised questions as to the compatibility with article 6.

20. Other limitations imposed by article 6 of the ICCPR are the following.

21. A sentence of death can only be imposed for the most serious crimes. The Human Rights Committee considers that this expression "must be read restrictively to mean that the death **penalty** should be a quite exceptional measure". The notion of most serious crimes was later developed in the Safeguards guaranteeing protection of the rights of those facing the death **penalty**, according to which the most serious crimes are those "intentional crimes with lethal or other extremely grave consequences". The **Special** Rapporteur considers that the term "intentional" should be equated to premeditation and should be understood as deliberate intention to kill.

22. A sentence of death can only be imposed following the strictest observance of the highest procedural safeguards. An indisputable characteristic of the death **penalty** is its irreversibility. The **Special** Rapporteur, therefore, believes that the highest fair trial guarantees must be fully observed in trials leading to its imposition. He holds the opinion that all safeguards and due process guarantees must be fully respected, both during the pre-trial and trial, as provided for by the ICCPR and various other international instruments. Article 6 (2) clearly states that the **penalty** of death can only be carried out pursuant to a final judgement rendered by a competent court. Article 6 (4) provides for the right to seek pardon or commutation.

23. Article 14 of the Covenant, which sets the basic fair trial standards, includes the right to equality before the courts, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, the right to the presumption of innocence, the right to appeal and the right to be compensated in case of miscarriage of justice. Article 14 (3) lists the minimum fair trial guarantees, which include the right to be informed promptly of the nature and cause of the charge, the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing. The Committee has expressed the view that the "requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing ...". In addition, the Human Rights Committee considers that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant".

24. A sentence of death cannot be imposed on minors and cannot be carried out on pregnant women. International law prohibits the imposition of the death **penalty** on juvenile offenders. Article 6 (5) of the ICCPR provides that the death **penalty** shall not be imposed for crimes committed by persons below 18 years of age. This principle has been repeated in article 37 (a) of the Convention on the Rights of the Child, rule 17.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") and paragraph 3 of the Safeguards guaranteeing protection of the rights of those facing the death **penalty**. Also, article 6 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), stipulates that the death **penalty** shall not be pronounced on persons who were under 18 years of age at the time they committed the offence.

25. In addition to the ICCPR, other international instruments ratified by the United States include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and

the International Convention on the Elimination of All Forms of Racial Discrimination. The United States has also signed, but not ratified, the Convention on the Rights of the Child. The Convention on the Rights of the Child has been universally ratified, except by two countries: the United States of America and Somalia.

26. Further, the United States has signed, but not ratified, the American Convention on Human Rights, which also forbids the imposition of the death **penalty** on juvenile offenders. [back to the contents]

B. Reservations by the United States to the ICCPR and the position of the Human Rights Committee

27. At the time of ratification of the ICCPR, the United States entered reservations concerning certain rights contained in the Covenant. By entering a reservation, a State purports to exclude or modify the legal effect of a particular provision of the treaty in its application to that State. According to the Vienna Convention on the Law of Treaties, reservations to multilateral treaties are allowed, providing that the reservation is compatible with the object and purpose of the treaty itself. One of the reservations entered by the United States makes particular reference to the death **penalty** provision of article 6.

28. According to this reservation, "the United States reserves the right, subject to its constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age".

29. In its concluding observations to the initial report of the United States of America (CCPR/81/Add.4), the Human Rights Committee expressed concern at this reservation which it believes to be incompatible with the object and purpose of the ICCPR.

30. It is the view of the **Special** Rapporteur that this reservation leaves open the possibility of executing persons with mental retardation. Further, he is of the opinion that the term "future", under the notion of "existing or future laws permitting the imposition of capital punishment" is not compatible with the restrictive spirit of article 6 of the ICCPR.

31. Eleven States parties to the ICCPR objected to the reservation entered by the United States. The Human Rights Committee states that the content and scope of reservations may "undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties". It also states that the absence of a prohibition on reservations (reservations are not prohibited by the Covenant) "does not mean that any reservation is permitted".

32. Further, according to the Committee, "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation. In addition, as article 4 of the Covenant declares article 6 to be a non-derogable right, a State which makes a reservation to such a right is under a "heavy onus".

33. The United States also entered an understanding, according to which the Covenant "shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the State and local Governments". The

Special Rapporteur considers that nothing in this understanding precludes Federal and State Governments from making the necessary efforts to implement the Covenant throughout the country. Further, he is of the opinion that the federal structure should not be an obstacle to the implementation of the Covenant.

34. The United States also made several declarations. It declared "that the provisions of articles 1 through 27 of the Covenant are not selfexecuting". In its initial report to the Human Rights Committee, the United States explained that this declaration does not limit the international obligations of the United States; rather, it meant that, as a matter of domestic law, the Covenant did not, by itself, create private rights directly enforceable in United States courts. Further, according to the United States report, fundamental rights and freedoms protected by the ICCPR are already guaranteed in United States law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For those reasons, it was not considered necessary to adopt **special** implementing legislation to give effect to the provisions of the ICCPR in domestic law.

35. In its concluding observations on the initial report of the United States of America, the Human Rights Committee regretted the extent of the reservations, declarations and understandings to the Covenant as, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. [back to the contents]

C. Other restrictions imposed by international law

36. Imposition of the death **penalty** on mentally retarded or insane persons is also prohibited. Paragraph 6 of the Declaration of the Rights of Mentally Retarded Persons, provides that, if prosecuted for any offence, a mentally retarded person shall have the right to due process of law with full recognition of his degree of mental responsibility. Further, paragraph 3 of the Safeguards guaranteeing protection of the rights of those facing the death **penalty** stipulates that the death **penalty** shall not be carried out on persons who have become insane. In addition, in paragraph 1 (d) of resolution 1989/64 on implementation of the safeguards guaranteeing protection of the rights of those facing the death **penalty**, the Economic and Social Council recommended that States strengthen further the protection of the rights of those facing the death **penalty** by eliminating the death **penalty** for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution. [back to the contents]

II. THE GENERAL CONTEXT OF THE DEATH PENALTY IN THE UNITED STATES

37. Currently, 40 jurisdictions in the United States of America have death **penalty** statutes. Thirteen other jurisdictions do not. According to the information received, 3,269 persons are on death row, of whom 47.05 per cent are White, 40.99 per cent are Black, 6.94 per cent are Hispanic, 1.41 per cent are Native American, and 0.70 per cent are Asian. Of the total death row population, more than 98 per cent are male.

38. Since the death **penalty** was reinstated in 1976, 403 persons have been executed. There have been no federal executions since 1963. Out of these 403 executions, only 6 white persons have reportedly been executed for the murder of a black person. Texas has been responsible for more than 30 per cent of the executions, followed by Virginia (10.17 per cent) and Florida (9.68 per cent). It is reported that since the reinstatement of death **penalty** statutes, more than 47 persons have been released from death row because of later evidence of their innocence (see paras. 115-116 below).

39. One hundred and fourteen women have reportedly been sentenced to death from 1973 to June 1997. Of them 47 are on death row and 66 had their sentences either reversed or commuted to life imprisonment. Florida, North Carolina and Texas account for the highest imposition of female death sentences. Female executions have been rare. The last woman executed was in 1984 in North Carolina.

40. Nine juvenile offenders, individuals aged less than 18 at the time they committed the crime for which they were convicted, have been executed.

41. In 1972, the Supreme Court found the application of the death **penalty** unconstitutional and invalidated both federal and state-level death **penalty** statutes. In Furman v. Georgia (1972), the United States Supreme Court ruled that the existing death **penalty** laws were being applied in an arbitrary and capricious manner, which violated the Constitution. Justice White, in his concurring opinion in the Furman case, stated that with respect to the death **penalty** "there was no meaningful basis for distinguishing the few cases in which it was imposed from the many cases in which it was not". In Gregg v. Georgia (1976), the Supreme Court ruled that the death **penalty** did not violate the Constitution if it was administered in a manner designed to protect against arbitrariness and discrimination. This ruling was used by the states, and eventually the Federal Government, to reintroduce the death **penalty** in accordance with certain guidelines and provisions aimed at eliminating arbitrariness.

42. However, information brought to the attention of the **Special** Rapporteur indicates that a significant degree of unfairness and arbitrariness in the administration of the death **penalty** 25 years after Furman appears to still prevail. In this context, in February 1997, the American Bar Association (ABA) called for a moratorium on executions in the United States until jurisdictions implement procedures and policies intended to ensure that death **penalty** cases are administered fairly and impartially, in accordance with due process.

43. It was brought to the **Special** Rapporteur's attention that the guarantee of due process in capital cases has been seriously jeopardized following the adoption of the federal 1996 Anti- Terrorism and Effective Death **Penalty** Act. This law severely limits federal review of state court convictions and curtails the availability of habeas corpus at the federal level. In addition, the withdrawal of funding for post-conviction defender organizations, which were handling capital punishment cases at the post-conviction level and helping attorneys involved in death **penalty** cases, seriously limits the extent to which fair trial standards are fully available during the process leading to the imposition of a death sentence. [**back to the contents**]

III. FINDINGS OF THE SPECIAL RAPPORTEUR

A. Current practices in the application of the death penalty

1. Reintroduction of death **penalty** statutes and extension of the scope

44. The **Special** Rapporteur has observed a tendency to increase the application of the death **penalty** both at the state level, either by reinstating the death **penalty** or by increasing the number of aggravating circumstances, and at the federal level, where the scope of this punishment has recently been dramatically extended.

45. The States of Kansas and New York reinstated the death **penalty** in 1994 and 1995, respectively. On 7 March 1995, New York became the thirtyeighth state to reinstate the death **penalty**. The bill, signed by Governor Pataki of New York, came into force on 1 September 1995. According to information received, Governor Pataki reportedly referred to the prevention of violent crime as a justification for the new law. However, during a meeting with the Bronx District Attorney, the **Special** Rapporteur was informed that from 663 homicides committed in the Bronx in 1990, the figure had gradually lowered in subsequent years, to reach 249 in 1996. Since the reinstatement of the death **penalty** in New York, 15 persons are said to have been charged with capital murder.

46. The **Special** Rapporteur has recently been informed that a proposal to reinstate the death **penalty** in Washington, D.C. for those convicted of killing law enforcement officials is expected to be considered by the Senate at the beginning of 1998.

47. In the past several years, a number of States, including Alabama, Colorado, Delaware, Georgia, Indiana, New Hampshire, North Carolina and Tennessee, have enacted laws which increased the number of aggravating circumstances which qualify a murder as a capital case. In Florida, the legislature has, since 1972, expanded the number of aggravating circumstances from 8 to 14. By increasing the number of aggravating circumstances states are widening the scope of the death **penalty**.

48. Similarly, at the federal level, several legislative developments have led to an expansion of the scope of the death **penalty**. Following the reintroduction of the federal death **penalty** in 1988 through the AntiDrug Abuse Act, another law, the Federal Death **Penalty** Act, was signed into law by the President on 13 September 1994. This new law expanded the federal death **penalty** to more than 50 new offences. The law provides for the death **penalty** in a range of crimes involving murder of federal officials. The death **penalty** could also be applied for non- homicidal offences such as attempted assassination of the President, treason, espionage and major drugtrafficking.

2. Execution of juveniles

49. International law prohibits the imposition of a death sentence on juvenile offenders (those who committed the crime while under 18 years of age). The consensus of the international community in this respect is reflected in the wide range of international legal instruments (see para. 24 above). On 27 March 1987, the Inter-American Commission on Human Rights declared that the United States had violated provisions of the American Convention on Human Rights by permitting the execution of two juvenile offenders, even though, having signed the Convention, it had not ratified it. The Commission recognized the existence among the member States of the Organization of American States of a regional jus cogensnorm prohibiting the execution of juvenile offenders and referred to the emergence of a norm of customary international law establishing 18 as the minimum age for imposition of the death **penalty**. 50. Despite this clear recognition of the prohibition of executing juvenile offenders, the United States of America is one of the few countries whose legislation allows for the imposition of the death **penalty** on and execution of juveniles. In a letter sent by the United States Government to the **Special** Rapporteur on 22 September 1993, the Government acknowledged a difference between United States law and international law: "The United States Government realizes that its law differs from the International Covenant on Civil and Political Rights on this point. This difference in law was the basis for a reservation to the United States ratification of the Covenant."

51. Out of the 38 states with death **penalty** statutes, 14 provide that 18 is the minimum age for

execution. In 4 states, 17 is the minimum age, while in 21 other states, 16 is the minimum age. According to the information received, 47 offenders who committed the crimes before the age of 18 are currently on death row. At the federal level, the imposition of the death **penalty** on juvenile offenders is not permitted.

52. In Thompson v. Oklahoma (1988), the Supreme Court ruled that it was unconstitutional to impose the death **penalty** on a person who was under 16 years of age at the time of commission of the crime. In Stanford v. Kentucky, the Supreme Court ruled that it was constitutional to impose the death **penalty** on an offender who was aged 16 at the time of commission of the crime.

53. Although the United States of America has not executed any juvenile offenders while still under 18, it is one of the few countries, together with the Islamic Republic of Iran, Pakistan, Saudi Arabia and Yemen, to execute persons who were under 18 years of age at the time they committed the crime. Charles Rumbaugh was the first juvenile offender executed in the United States since the reinstatement of the death **penalty** in 1976. He was executed in Texas in September 1985. The last one, Christopher Burger, was executed in Georgia in December 1993.

54. In a capital case, age should be regarded as a mitigating factor. In Eddings v. Oklahoma(1982), the Supreme Court ruled that the "chronological age of a minor is itself a relevant mitigating factor of great weight". However, the **Special** Rapporteur was informed that in some capital cases concerning juvenile offenders, age was not presented as a mitigating factor at the sentencing phase of the trial. In this context, he was informed that during the trial in Texas of Robert Anthony Carter, an African-American juvenile offender charged with murder and with no prior criminal record, the jury was not invited to consider his age as mitigating evidence. By letter dated 8 February 1993, the United States Government informed the **Special** Rapporteur that the death **penalty** is available in juvenile cases "only when the court has determined to try the defendants as adults". However, the **Special** Rapporteur was informed that in practice in some states whose laws allow for persons under 18 to face the death **penalty**, minors charged with aggravated murder are very often tried in adult courts.

55. The **Special** Rapporteur wishes to emphasize that international law clearly indicates a prohibition of imposing a death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but also the imposition of a sentence of death on a juvenile offender by itself. Accordingly, the Criminal Justice Section of the ABA, in August 1983, adopted a resolution calling for the abolition of the imposition of the death **penalty** for juveniles.

56. Since his appointment, the **Special** Rapporteur has intervened on behalf of the following juvenile offenders: Johnny Franck Garrett, executed in Texas in February 1992; Christopher Burger, executed in Georgia in December 1993; and Azikiwe Kambule, a 17-yearold South African national reportedly facing charges of first-degree murder in Mississippi. The **Special** Rapporteur was informed that on June 1997 Azikiwe Kambule was sentenced to a term of 35 years in prison on charges of "car jacking and accessory after the fact of murder".

3. Executions of persons with mental retardation

57. According to information received from non-governmental sources, at least 29 persons with severe mental disabilities have been executed in the United States since the death **penalty** was reinstated in 1976. Twentyeight capital jurisdictions are said to permit the execution of mentally retarded defendants. Eleven death **penalty** states, and the Federal Government, prohibit the execution

of mentally retarded persons.

58. Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation and confession. Moreover, mental retardation appears not to be compatible with the principle of full criminal responsibility. The **Special** Rapporteur believes that mental retardation should at least be considered as a mitigating circumstance.

59. On 7 February 1989, the ABA adopted a resolution urging that no person with mental retardation, as defined by the American Association on Mental Retardation, should be sentenced to death and executed. It further resolved that the ABA supports enactment of legislation barring the execution of those individuals with mental retardation.

60. The **Special** Rapporteur has intervened, inter alia, on behalf of Emile Duhamel, reportedly suffering from severe mental retardation and unable to understand the nature of the proceedings against him. The **Special** Rapporteur met Emile Duhamel while visiting death row inmates in Huntsville, Texas. [back to the contents]

B. The administration of the death penalty

61. A death sentence may be imposed both at the federal and state levels. The majority of death **penalty** sentences are imposed at the state level. Each capital punishment state has its own statute and each state determines how the death **penalty** will be administrated within the state. However, only a very small proportion of murders result in a sentence of death.

62. It is to be noted that the small percentage of defendants who receive a death sentence are not necessarily those who committed the most heinous crimes. Many factors, other than the crime itself, appear to influence the imposition of a death sentence. Class, race and economic status, both of the victim and the defendant, are said to be key elements. It is alleged that those who are able to afford good legal representation have less chance of being sentenced to death. The influence of public opinion and political pressure cannot be disregarded either. In addition, racial attitudes of lawyers, prosecutors, juries and judges, although not necessarily conscious, are also believed to play a role in determining who will, or who will not, receive a death sentence. Supreme Court Justice Blackmun, in his dissenting opinion in Callins v. Collins(1994) made reference to this problem stating that "(...) the death **penalty** remains fraught with arbitrariness, discrimination, caprice and mistake". He also stated that "Even under the most sophisticated death **penalty** statutes, race continues to play a major role in determining who shall live and who shall die".

63. Allegations of racial discrimination in the imposition of death sentences are particularly serious in southern states, such as Alabama, Florida, Louisiana, Mississippi, Georgia and Texas, known as the "death **penalty** belt". The **Special** Rapporteur was informed that a discriminatory imposition of capital sentences may be favoured by the composition of the judiciary: in Alabama, only 1 of the 67 elected district attorneys is said to be black, and none of Georgia's 159 counties is reported to have a black district attorney. The majority of judges in these states are also reported to be white.

64. In one of the most prominent related rulings, McCleskey v. Kemp (1987), the Supreme Court considered racial disparities as "an inevitable part of our criminal justice system". In this case, evidence of racial discrimination was based on a study, known as the Baldus Study, which showed that in Georgia, defendants who killed white victims were more than four times as likely to get the death **penalty** than those who killed Blacks. The Court held that studies demonstrating statistically

that the death **penalty** was racially discriminatory were not sufficient, and that each defendant had to prove the existence of racial bias in his case and present "exceptionally clear proof" that "the decision makers in his case acted with discriminatory purpose".

65. This ruling has had the effect of allowing the courts to tolerate racial bias because of the great difficulties defendants face in proving individual acts of discrimination in their cases. The Supreme Court has maintained that direct, purposeful discrimination may always support a challenge to a capital conviction, but that statistical evidence alone demonstrating indirect discrimination may not, in itself, be sufficient grounds for a constitutional challenge. Doubts are raised about the compatibility of this ruling with obligations undertaken under the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States parties to take appropriate steps to eliminate both direct and undirect discrimination.

66. Some reports have reached the conclusion that a pattern of racial discrimination exists in the United States justice system. In his report on his mission to the United States (E/CN.4/1995/78/Add.1), the United Nations **Special** Rapporteur on contemporary forms of racism, Maurice Glèlè Ahanhanzo, stated that "Racial factors affect the judicial process, from the moment of arrest right through to the trial" (para. 60). He concluded that for similar offences or crimes, ethnic minorities are more likely to receive a harsher **penalty** than a white. According to the **Special** Rapporteur, "this imbalance is also the result of the inadequate representation of ethnic minorities on juries".

67. The Racial Justice Act was passed by the House of Representatives as an amendment to the 1994 Crime Bill, but was rejected in the Senate. The Act would have allowed the defendant to introduce evidence of racism by the use of statistics and would have removed the need to prove discriminatory intent on the part of any specific individual or institutions. Thus, it would have set in place a system for challenging racially discriminatory sentences. Without the Racial Justice Act, defendants have a very high burden of proving intentional discrimination in their case in order to succeed on appeal.

68. Other elements which may have a direct or indirect influence in the determination and imposition of a death sentence are discussed below.

1. The judiciary

69. Federal judges are appointed for life. At the state level, in only 6 of the 38 death **penalty** states are judges appointed for life by the state governor. In the other 32 states, judges are subject to election.

70. The possibility of elected or appointed judges is recognized in principle 12 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. No matter what system is being used, the judiciary shall decide matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect (principle 2).

71. Many sources have expressed concern as to whether the election of judges puts their independence at risk. In its concluding observations to the United States report, the Human Rights Committee expressed its concern about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the

ICCPR.

72. During his mission, the **Special** Rapporteur held meetings with several lawyers and members of the bar in different states who acknowledged having received letters from judges requesting financial contributions for their campaigns for reelection. It is difficult to determine the influence that the electorate and a financial contribution to an election campaign may have on a judge. While in most cases it will depend on the degree of integrity of the individual judge, it is certain that this situation exposes the judge to a higher level of pressure than those who, like federal judges, hold life tenures, do not have to run for reelection and are not accountable to volatile public opinion. The situation has become of serious concern in death **penalty** cases, particularly because state judges, in view of the recent legislative developments which minimize federal review of state court decisions, are making decisions with considerably less opportunities for review.

73. The concern becomes even more significant in those states where judges have the possibility of overriding the decision of a jury, such as in Alabama, Delaware, Florida and Indiana. It is alleged that because of public support for the death **penalty**, some judges may not dare to override or overturn a death sentence in fear of the repercussions this may have on his/her professional career. According to the information received, in Alabama, about 25 per cent of persons on death row were said to have been recommended for life sentences by their juries but the judge overrode the decision. In Florida, Alabama and Indiana, judges are alleged to have imposed death sentences in a total of 189 cases in which the jury recommended life imprisonment, death recommendations were said to have been reversed in 60 cases.

74. According to information brought to the attention of the **Special** Rapporteur, it is very difficult for a judge who has reservations regarding the death **penalty** to be reelected. In state judicial elections, judges have been attacked for their decisions in death **penalty** cases. Mississippi Supreme Court Justice James Robertson was defeated in his 1992 campaign allegedly for having overturned death sentences. He was said to have been aggressively attacked in this respect by prosecutors and victims rights groups. Justice Penny White, of Tennessee's Supreme Court, was not reelected for having voted for the overturning of a death sentence, allegedly after finding insufficient evidence to uphold the sentence. Reportedly, she was attacked during the judicial elections in August 1996 for her opposition to the death **penalty**. In 1994, Judge Charles Campbell was reportedly voted off the Texas Court of Criminal Appeals after a reversal in a capital case. In 1992, Judge Norman Lanford was also voted off the State District Court in Texas following his recommendation that a death sentence be overturned due to prosecutorial misconduct.

75. The **Special** Rapporteur wishes to emphasize that the election of judges does not necessarily influence the outcome of judicial decisions. However, the lack of financial transparency during election campaigns and the short duration of terms make judges more exposed to pressure, which may jeopardize their independence or impartiality. Increasing the length of judicial terms, as well as strict public control on fundraising in judicial elections, would reduce the risk of unduly influencing judges.

2. Prosecutorial discretion

76. Prosecutors have great discretionary powers in determining in which cases to seek the death **penalty**. In all murder cases in which the death **penalty** may be sought (because the case appears to meet the aggravated factors set out in the state statutes as sufficient for capital murder), the prosecutor has the unreviewable discretion to decide to proceed with a capital charge or not. No state

sets out additional guidance as to when the prosecutor should seek death. In some statutes, like that in Florida, aggravating factors making a murder eligible for capital murder may be as vague as "especially heinous". Because of this discretion, some prosecutors will seek the death **penalty** almost all the time while others, in similar cases, will not.

77. The Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, make specific reference to the discretionary powers of the prosecutor. Guideline 17 provides that when prosecutors are vested with discretion, the law shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process.

78. The fact that a death sentence is not mandatorily sought by the prosecutor, and that he/she exercises discretion in deciding whether to seek it or not, may mean that, in fact, the death **penalty** is sought less often. However, on the other hand, this same discretion allows that for similar cases the decision of the prosecutor can be different, therefore increasing the risk of arbitrariness and bringing a sense of unfairness to those who are "picked out" to be prosecuted as death **penalty** cases. The question to be raised here is: Where is the borderline between life and death?

79. An example of arbitrariness caused by this discretion can be seen by analysing the death row population in Texas. As of June 1997, the sentences of 136 persons on death row originated from Harris County, followed by 32 from Dallas County, 28 from Tarrant County and 27 from Bexar County. The **Special** Rapporteur is of the opinion that this statistical difference may be partly explained by the discretionary powers of the prosecutors.

80. Another important aspect of prosecutorial discretion is that the prosecutors have the ability to plea bargain. In many cases, the prosecutor will offer the option of not seeking the death **penalty** if the defendant agrees to plead guilty to a lesser offence. In cases with several defendants, plea bargains will be offered in return for one of the defendants testifying against his/her co-defendant(s).

81. An additional aspect of the prosecutors' role is that they may seek the opinion of the family of the victim. The **Special** Rapporteur was informed by several District Attorney's Offices that the view of the family is taken into consideration as long as their request is compatible with the gravity of the offence. Non-governmental sources report that there may be excessive discretion in the selection of which families the office of the prosecutor will or will not approach. According to the information received, the selection of which families the prosecutor approaches has often been alleged to be influenced by race and class. The **Special** Rapporteur met with victims' families who had been approached by the local prosecutor, but once they informed the prosecutor that they did not wish the death **penalty** to be sought, the prosecutor stopped cooperating with them. The discretion in selecting which families the office of the prosecutor approaches may indeed increase the risk of arbitrariness in imposing a sentence of death.

82. The **Special** Rapporteur explained to prosecutors with whom he met that allegations of racial discrimination in deciding when to seek the death **penalty** were being received at his office. He was informed by District Attorneys in some states that when the decision whether to seek the death **penalty** is made, no particular information concerning the race of the defendant or the victim is brought to the attention of the District Attorney. However, due to the fact that this information is contained in police files, it is difficult to imagine that this information is not available to the prosecutor.

83. Politics may also interfere in the discretionary power of the prosecutors. In March 1996, New York Governor George Pataki decided to supersede the authority of Bronx District Attorney Robert T. Johnson in the murder case of a police officer. Mr. Johnson had previously expressed his intention to exercise his discretion to pursue life without parole in every appropriate case. The Governor referred the case to the State AttorneyGeneral, Dennis Vacco, who announced he would seek the death **penalty**. The **Special** Rapporteur was also informed that the Manhattan District Attorney, Mr. Robert M. Morgenthau, was under pressure from the Governor of the State of New York as well as the Mayor of New York City to seek the death **penalty** for a defendant accused of killing a police officer. Reportedly the New York Court of Appeals recently ruled that the State AttorneyGeneral of New York may take over a death **penalty** case if a District Attorney decides as a matter of discretion not to pursue the death **penalty**. While the discretion of the prosecutor is virtually unreviewable, it is not insulated in practice from pressures which can affect the prosecutor's decisions in ways that may increase arbitrariness.

84. At the federal level, more processes have been put in place to restrict or guide the discretion of the federal prosecutors. For example, the death **penalty** may only be sought with the written authorization of the AttorneyGeneral. Federal attorneys prepare Death **Penalty** Evaluations in which they identify aggravating and mitigating circumstances, indicating why a capital sentence is recommended. A committee at the Department of Justice will further evaluate the case and forward its recommendation to the AttorneyGeneral, who will make the final decision.

3. Jury selection process

85. In 28 states of the 38 with death **penalty** statutes, the sentencing decision is in the hands of the jury. In four states, Alabama, Delaware, Florida and Indiana, the jury makes a recommendation concerning sentencing which can be overridden by the judge. In other states, including Arizona, Colorado, Idaho, Montana and Nebraska, the decision is made by the judge.

86. In the United States a person charged with a capital offence has the right to be tried before a jury. A jury of 12 persons is selected from the community. Juries are selected from panels drawn randomly from local residents, generally through lists of persons with a driver's licence or registered to vote. Prospective jurors will be questioned to find out if they have any biases which will keep them from serving as a member of the jury charged to carry out the law impartially. During the jury selection process, both the prosecutor and the defence lawyer have a right to exclude certain people from the jury, either for a stated reason, or without giving a reason. Exclusion for no explained reason is known as peremptory challenge. The prosecutor and the defence lawyer have the power to use a limited number of peremptory challenges and an unlimited number of challenges for cause. In Batson v. Kentucky, the Supreme Court noted that peremptory challenges on invalid racial grounds are not acceptable. However, in practice it is impossible to acknowledge that the system does not tolerate the use of peremptory challenges along racial lines. As a result, it has not been uncommon that black defendants are tried before a totally or almost allwhite jury.

87. In this regard, the **Special** Rapporteur has intervened, inter alia, on behalf of: (a) Johnny Watkins, black, who was sentenced to death by an all-white jury in Danville, Virginia, and executed on 3 March 1994. The prosecutor had allegedly eliminated all prospective black jurors from the jury through peremptory challenges; and (b) Hernando Williams, black, executed in Illinois in March 1995, after having been convicted and sentenced to death by an all-white jury in Cook County, Illinois, after the prosecutor had excluded all 26 black jurors from jury service. In both cases their victims were reportedly white.

88. During a jury selection for a capital trial, potential jurors will be asked if they are opposed to the death **penalty**. Those who are oppossed to the death **penalty** are likely to be taken off the panel of prospective jurors. Many members of minority groups are opposed to the death **penalty** because it has been disproportionately used against members of their respective communities. Even if a potential juror says that he is against the death **penalty** but that he may consider imposing it, his exclusion can be justified.

89. It is the **Special** Rapporteur's view that while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death **penalty** or have reservations about it seem to be systematically excluded from sitting as jurors. 90. Two phases can be differentiated in capital cases. In the initial phase, the jury determines whether the defendant is guilty or innocent. If he/she is found guilty, the second phase of the trial consists in determining the **penalty**. The possible choices may be death, life imprisonment and, in some states, life imprisonment without possibility of parole. Generally, in the second phase of the trial the jury has to find, in order to impose a death sentence, that there are statutory aggravating circumstances (most states have between 7 and 10 in their statutes). At least one aggravating circumstance has to be found in order to impose a death **penalty**. Consideration has to be given, however, to mitigating circumstances (whatever information the defendant offers in order to convince the jury to spare his life). The jury is instructed to balance aggravating and mitigating circumstances before coming to a verdict. If they find at least one aggravating circumstance that outweighs mitigating circumstances, the result can be a death sentence (see para. 119 below).

91. In this second phase of the trial, when the jury has to determine the **penalty**, the guidance that the jury receives may inappropriately influence the **penalty**. Thus, according to information received, the information the juries receive concerning the meaning of the sentencing options varies according to the state. For example, in Texas, the jury cannot be instructed on the meaning of "life imprisonment". This situation gives rise to strong concerns because in many cases jurors are said to believe that by choosing life imprisonment the defendant may shortly be released from prison. However, different surveys (see paras. 103-104) show that when a person is informed about the meaning of life imprisonment, if given the option of choosing between the death **penalty** or life imprisonment, they tend to choose the second option.

4. The right to counsel: impact of defunding resource centres and the 1996 Anti-Terrorism and Effective Death **Penalty** Act

92. Federal and state criminal procedures ensure the right to counsel for trial and direct appeal in death **penalty** cases. There is no guarantee of counsel at postconviction review. However, this constitutional right to counsel does not always ensure adequate or effective counsel. The importance of adequate legal representation, particularly in capital punishment cases, is essential because ineffective counsel may result in death.

93. When a person is arrested and charged with a capital offence, there are several options concerning counsel. If the defendant has enough financial resources he/she may get a private lawyer. If the defendant cannot afford a private lawyer, the state, in those states where there is an institutionalized public defender system, such as in Florida, or a capital defenders office, as in New York, will provide counsel for indigent defendants. If the state does not have a public defender system, such as Texas, and the defendant is indigent, the defendant has a right to a court-appointed lawyer.

94. The competence of the initial lawyer is fundamental, as many issues, including factual and legal issues which are not raised at the trial stage, are barred from being introduced in the appeal phase. Allegations concerning lack of adequate and effective counsel are of particular concern in those states where the constitutional right to counsel is provided through a court-appointed lawyer. The particularities and the complexity of a capital case make standard professional qualifications inadequate to represent a defendant facing capital punishment. However, when a judge appoints a lawyer to represent a capital defendant, he/she does not necessarily consider the qualifications of the appointed lawyer. There are no specific criteria which a judge must use to appoint a lawyer. It depends entirely on the judge's decision. An additional difficulty is that court-appointed lawyers are reportedly not allocated sufficient resources to conduct investigations and develop evidence in favour of their clients. Negative racial attitudes of some court-appointed lawyers against their clients have also been documented. Furthermore, the lawyer is appointed by a judge who, in some states, is an elected official. Reportedly, judges are on many occassions elected for their strong position in favour of the death **penalty**. These factors may reportedly lead to the selection of pro-death **penalty** lawyers to defend capital cases.

95. Allegations of ineffective counsel in death **penalty** cases have been brought to the attention of the **Special** Rapporteur on several occasions. The **Special** Rapporteur intervened on behalf of Mumia Abu-Jamal, black, sentenced to death in Pennsylvania for the murder of a white police officer, after concerns about the competence of his trial counsel, the inadequate funding provided to the defence to investigate the case and doubts about the evidence collected against him were brought to his attention. He also intervened on behalf of Calvin Burdine, a homosexual, sentenced to death in Texas. According to the information received, his lawyer fell asleep on several occasions during the trial. The lawyer was said to have accepted three jurors onto the jury who were said to have prejudice against homosexuals. Further, the **Special** Rapporteur was informed that the lawyer failed to object to the statement made by the prosecutor during the sentencing phase of the trial, according to which being sent to the penitentiary was not a very bad punishment for a homosexual. The Texas Court of Criminal Appeals reportedly ruled that his lawyer's failure to stay awake did not affect the outcome of the case. However, the federal court gave Burdine a stay of execution and ruled that another hearing was necessary to establish if his trial had been prejudiced.

96. The importance of the initial defence counsel is also crucial because in some states it is very difficult to obtain relief on the basis of ineffective counsel. According to the information received, in several cases in Texas, despite strong evidence suggesting ineffective counsel, the Court of Criminal Appeals rejected findings and denied relief without a written opinion explaining why they rejected the findings. A similar disregard for appeals on claims of ineffective counsel is reported in the federal court system. In particular, two federal courts, the Fifth Circuit Court of Appeals, which covers Texas, Mississippi and Louisiana, and the Fourth Circuit Court of Appeals, which covers North Carolina, South Carolina, Virginia, West Virginia and Maryland, are reportedly very unlikely to grant relief on ineffective counsel claims.

97. Even though there is no constitutional right to counsel at a post-conviction level, many states and the Federal Government had previously funded post-conviction defender organizations (PCDOs), also known as resource centres, which represented persons at this stage of the proceedings or provided help to lawyers representing them. They also helped by trying to locate counsel for death row prisoners.

98. The already difficult situation concerning adequate counsel has been worsened by the severe cuts in funding for PCDOs in 1995, and by the enactment of the 1996 Anti-Terrorism and Effective Death

Penalty Act.

Defunding of PCDOs

99. Created in 1988, the PCDOs helped to raise the quality of representation at post-conviction and habeas corpus proceedings. In 1995, Congress stopped funding for PCDOs. The absence of PCDOs creates a grave difficulty for defendants at the post-conviction level, particularly in those states such as Texas which do not have a formally constituted agency or institution providing specialized court-appointed lawyers for capital defendants. While the judge is obliged to appoint a lawyer for trial and direct appeal, representation is not assured at the post-conviction level. The result is that many death row inmates do not have legal representation at post-conviction level. In some states, like California, the state has provided some money to continue supporting post-conviction representation. However, the **Special** Rapporteur was informed that 170 death row inmates in California currently have no legal counsel.

Enactment of the 1996 Anti-Terrorism and Effective Death **Penalty** Act

100. In April 1996, the President of the United States signed into law the Anti-Terrorism and Effective Death **Penalty** Act. The law was designed to shorten the time for the appeals process for convicts on death row. The law establishes limits on the number of habeas corpus appeals which may be made and sets time limits for federal courts to review decisions by state courts. This law will cause capital cases to proceed more quickly from state court to federal court and most substantive decisions will be made by state court judges. A further effect of this law is that the role of the federal judge in state capital punishment cases is substantially reduced. Under the new law, there is a narrower scope of review, so more aspects of the trial are unreviewable and justice depends more on the actions of the lower court judges. A movement to speed up executions in state law has also been reported. In some states, laws requiring capital defendants to raise all their claims at a single appeal have been enacted. The **Special** Rapporteur fears that this may lead to the legal impossibility of taking into account new evidence which becomes known at a later stage and to redress inadequacies caused by incompetent counsel.

101. In addition, in some states, such as Texas, where no public defender system exists, there is no institutional experience in defending death **penalty** cases. In addition, most of the judges are former prosecutors. Over the years, this creates a climate far more favourable to the prosecution than to the defence.

5. The right to seek pardon or commutation

102. Article 6 (4) of the ICCPR provides for the right to seek pardon or commutation of the sentence. The procedure for pardons or commutation differs from state to state. The **Special** Rapporteur was informed that in several states members of the board of pardons and paroles are appointed by the governor of the state. This may lead to politicization of the pardon or commutation. Pardon or commutation generally has limited fairprocedure safeguards and are unreviewable. The final decision is made in most cases by the governor and by the President in the federal system. In several states members of the parole boards meet and have granted or recommended pardon on several occasions. However, the **Special** Rapporteur was appalled to find out that in Texas, the members never meet, do not discuss the cases brought to their attention together and provide their individual votes by phone. Not surprisingly, the board has never recommended pardon in a capital case.

6. The role of public opinion

103. During his mission, the **Special** Rapporteur was repeatedly told that the death **penalty** is applied because that is what the people want. However, the **Special** Rapporteur emphasizes that a thorough analysis of the will of the people may change this assumption considerably. Recent studies in the United States show that people are not simply "in favour of" or "opposed to" the death **penalty**. According to criminologist Dennis Longmire, in his study on attitudes on capital punishment, positions on the death **penalty** are not so clear, and 73 per cent of the people have inconsistent attitudes towards this punishment. In his study, he concluded that "people tend to be quick to stand in support of this sanction, but they are just as quick to back off their support when given specific information about its administration". Further, as stated in the SecretaryGeneral's fourth quinquennial report on capital punishment (E/1990/38/Rev.1 and Corr.1 and Add.1), there is a need to differentiate between sporadic popular support of capital punishment and wellinformed opinion.

104. According to a 1997 poll conducted by Sam Houston State University, the number of Texans favouring the death **penalty** has slightly decreased. In 1977, 80 per cent of Texans reportedly supported capital punishment, while in 1997 the number dropped to 76 per cent. Despite this initial high figure, however, 48 per cent of the respondents to the survey who initially reported that they were uncertain about their position became opposed to the death **penalty** when offered the possibility of a life sentence option. Similar conclusions have been reached by other studies. Thus, William Bowers, in his New York study, found that 71 per cent of the respondents supported the death **penalty**. However, this figure was reduced to 19 per cent when the alternative of life imprisonment without parole was offered. [back to the contents]

C. Lack of awareness of United States international obligations

105. Government officials and members of the judiciary at the federal and state levels with whom the **Special** Rapporteur held meetings (with the exception of officials in the Department of State) had little awareness of the International Covenant on Civil and Political Rights and international legal obligations of the United States regarding the death **penalty**. Few knew that the United States had ratified this treaty and that, therefore, the country was bound by its provisions. It was brought to the attention of the **Special** Rapporteur that state authorities had not been informed by the Federal Government about the existence and/or ratification of this treaty, and were consequently not aware of it. No efforts appeared to have been undertaken by the Federal Government to disseminate the ICCPR.

106. In several cases, relevant state judicial authorities told the **Special** Rapporteur that, should a claim be brought before them on the basis of a violation of the ICCPR, they would consider and analyse its implications. However, many others told him that the ICCPR was not a state law and therefore was not applicable.

107. In view of this disturbing finding, at the end of his mission to the United States, the **Special** Rapporteur sent a fax, dated 8 October 1997, to the Department of State, Human Rights Division, requesting information on the efforts undertaken to disseminate the provisions of the ICCPR following its ratification. At the time of finalization of this report, almost three months later, no answer to his communication had yet been received.

108. There seems to be a serious gap in the relations between federal and state governments, particularly when it comes to international obligations undertaken by the United States Government.

The fact that the rights proclaimed in international treaties are already said to be a part of domestic legislation does not exempt the Federal Government from disseminating their provisions. Domestic laws appear de facto to prevail over international law, even if they could contradict the international obligations of the United States.

109. The **Special** Rapporteur has also found that there is a generalized perception that human rights are a prerogative of international affairs, and not a domestic issue. The fact that only the Department of State has a Human Rights Division, as well as the low level of awareness of international human rights standards within the Department of Justice, are clear indications of this phenomenon. While the **Special** Rapporteur recognizes the important role that the United States is playing in the establishment and monitoring of human rights standards in many countries of the world, he is compelled to note that human rights seem not to be taken seriously enough in the domestic arena.

110. The **Special** Rapporteur notes that both the Department of Justice and the Department of State are branches of the Federal Government and it is critical that they work together to ensure that obligations undertaken internationally by the United States are implemented domestically. Domestic implementation is the responsibility of all branches of the Government, executive, judicial and legislative. Within the executive branch, the Justice Department is one of the primary players in enforcing human rights domestically. Thus, it must work cooperatively to educate, disseminate and enforce the human rights obligations undertaken by the United States. [**back to the contents**]

D. Other issues of concern

1. Participation of victims in the justice system

111. The term "victim of crime" is defined, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly by its resolution 40/34 of 29 November 1985, as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights, through acts or omissions that are in violation of criminal laws (para. 1). According to this Declaration, victims (who are to be understood as including immediate family or dependants) of crimes are entitled to respect and compassion, as well as, inter alia, to access to mechanisms of justice, proper assistance throughout the legal process and prompt redress. Victims have no right to retaliation.

112. During his mission, the **Special** Rapporteur observed the existence of a very strong movement for victims' rights. According to the information received, 29 states have amended their constitutions to include specific rights for victims of crime. The **Special** Rapporteur is concerned by the fact that victims' rights as provided by law in some states may undermine the rights of the accused. Thus, in the Constitution of the State of Florida, section 16, it is stated that: "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation". Further, it also states that, "Victims of crime ... are entitled to the right to be informed ...".

113. The impact of the victims' rights movement led the President, in his State of the Union Address on 4 February 1997, to announce his support for passage of a victims' rights amendment to the Constitution. According to the information received, a proposal to amend the United States Constitution to recognize victims' rights in the criminal justice system is to be considered by Congress. The rights proposed for victims include, among others, the right to notice of all public proceedings concerning the crime and the right not to be excluded from them, the right to a final disposition free from unreasonable delay, and the right to have the victims' safety considered with

regard to the release from custody of the defendant.

114. Several aspects of this constitutional amendment, in particular the right to a final disposition free from unreasonable delay, appear to undermine the rights of the accused. This right seems to be intended to speed up prosecutions and limit appeals. There are fears that this right may interfere with the defendant's right to counsel. For example, if the defence would need more time to prepare the case, a victim could claim his constitutional right to have the process concluded, on the basis of which a request for continuance could be denied. Considering that habeas corpus proceedings may take place long after the trial, habeas proceedings already limited by the enactment of the Anti-Terrorism and Effective Death **Penalty** Act could be further undermined by the amendment as it could lead to shortening time periods.

2. The risk of executing the innocent

115. The **Special** Rapporteur holds the opinion that there is no such thing as an infallible legal system or one in which mistakes do not occur; to the contrary, mistakes do occur. However, acknowledging a mistake once a person has been executed is meaningless. The **Special** Rapporteur is concerned that in the United States innocent people may be sentenced to death and even executed. In Furman v. Georgia (1972), Justice Marshall referred to this problem stating that "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some". A report issued on 21 October 1993 by the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary listed 48 persons who had been released from death row from 1973 to 1993 because evidence of their innocence had emerged.

116. The **Special** Rapporteur intervened on behalf of Ricardo Aldape Guerra, convicted and sentenced to death in 1982 for the killing of a police officer in Houston. A federal judge ruled in 1994 that he should be released or retried, as the police and prosecutors in the case had acted in bad faith. The ruling was upheld by the United States Court of Appeals. A new trial was granted, but the Houston District Attorney dropped the charges. Ricardo Aldape Guerra, who had always denied that he shot the officer, was released in 1997.

3. Executions of foreign nationals

117. The United States ratified the Vienna Convention on Consular Relations in November 1969. By ratifying the Convention, the United States is obliged to comply with the requirements of its provisions. Article 36 provides for foreign nationals arrested in another country to be informed without undue delay of their right to contact their consulate for assistance.

118. Information received suggests that many of the foreigners who are currently sentenced to death in the United States were never informed of their rights under the Vienna Convention on Consular Relations. It is alleged that some 60 foreigners were sentenced to death without having had the assistance of their consulate. Some of them, like Mexican Irineo Tristan Montoya, sentenced to death in Texas, were executed. On 9 July 1997, in an apology issued by the Department of State on his case, it was stated that, "The Department of State extends, on behalf of the United States, its most profound apology for the apparent failure of the competent authorities to inform Mr. Tristan Montoya that he could have a Mexican consular officer notified of his detention".

119. Although information received makes it clear that the State Department has, on several

occasions, informed officials of various states, including governors and attorneysgeneral, of their duties under article 36, it appears that the periodic advisories given by the Department receive no consideration. It is of concern that reportedly no courts in any death **penalty** case have found that the preclusion of notification of the right to contact their consulate for assistance is sufficient to warrant relief. In the case of Joseph Standley Faulder, a Canadian national, the Fifth Circuit Court of Appeals called Texas's violation of the Convention a harmless error. Patrick Jeffries, also a Canadian citizen, sentenced to death in 1983 in Washington State, was never informed about his right under the Vienna Convention to contact the Canadian consulate for assistance. Allegedly, because of the omission, he was not able to obtain adequate legal representation and mitigating factors were not introduced in the sentencing phase of his trial, therefore leaving the jury no alternative but to sentence him to death.

120. Further, the lack of awareness on the part of judicial authorities about the Vienna Convention makes it difficult for lawyers to raise violations of this treaty. During the trial of Virginio Maldonado, a 31year-old Mexican national, the defence lawyer claimed a violation of the rights of his client under this treaty. According to the information received, the trial judge stated, referring to the Vienna Convention on Consular Relations: "I don't know that it exists ... I am not an international law expert". Further, the prosecutor in the case argued the law was irrelevant because it was not a Texas law. .

121. The **Special** Rapporteur is of the view that not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence, as provided for by the ICCPR. [**back to the contents**]

IV. DEATH AS A RESULT OF EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS

122. During his visit to the United States, the **Special** Rapporteur devoted a small proportion of his time to collecting information about other types of violations of the right to life, particularly those caused by excessive use of force.

123. According to the information received, deadly force nationwide is more likely to be disproportionately used on racial minorities. Cases of persons killed by police brought to the attention of the **Special** Rapporteur all concerned members of ethnic minorities, mainly AfricanAmericans and Hispanics. Young AfricanAmericans are said to be looked upon as potential criminal suspects. The **Special** Rapporteur was informed that according to a recent study conducted in the Washington, D.C. area on who is stopped for traffic violations, only 14 per cent of drivers were white while 73 per cent were AfricanAmerican. According to the information received, of the complaints filed with the New York City Civilian Complaint Review Board (CCRB) from January to June 1996, 75 per cent were filed by AfricanAmericans or Hispanics. In 65 per cent of the cases, the police officers involved were white.

124. Many police departments are trying to have a more balanced ethnic representation among their personnel in an effort to make them more representative of the local population. The **Special** Rapporteur was informed that in Miami, 50 per cent of the police officers are Hispanic, 25 per cent are AfricanAmerican and 25 per cent white. In New York, 72.2 per cent of the officers are white, 15.2 per cent are Hispanic and 11.5 per cent are AfricanAmerican. Balancing the composition of police departments according to the ethnic distribution of the local population may also have a positive impact in reducing allegations of racial bias.

125. During public hearings he held in New York, the **Special** Rapporteur was informed, inter alia, that the following persons had been killed by police officers:

(a) José Antonio Sánchez, Dominican, killed on 22 February 1997 by a police officer during a raid on the El Caribe restaurant in Queens where he worked as a cook. Police claimed Sánchez attacked them with a knife;

(b) Frankie Arzuega, aged 15, Puerto Rican, killed on 12 January 1996 after being shot in the back of the head as he sat in the back seat of a car stopped by police officers of the 90th Precinct in Brooklyn. Police claimed the driver of the car tried to drive off while being questioned by one of the police officers. No weapons were found. Officers did not report the case for three days, and were not disciplined;

(c) Yong Xin Huang, aged 16, Chinese, shot on 24 March 1995 by a Brooklyn police officer investigating reports of a child with a gun. He was shot at close range behind the ear. He was playing with a pellet gun;

(d) Anibal Carrasquillo, aged 21, Puerto Rican, shot dead by a police officer in Brooklyn on 22 January 1995. Police reportedly claimed he was acting in a suspicious manner. No weapon was found and an autopsy revealed that he was shot in the back;

(e) Aswon Watson, aged 23, AfricanAmerican, killed on 13 June 1996 in Brooklyn. Reportedly shot 18 times by officers of the 67th Precinct while sitting in a stolen car. No arms were found. A grand jury chose not to indict the officers;

(f) Anthony Rosario, aged 18, and Hilton Vega, aged 21, both Puerto Rican, shot on 22 January 1995 by police from the 46th Precinct in the Bronx while trying to rob an apartment. Rosario was shot 14 times in the back and side. In March 1995 a grand jury voted not to bring criminal charges against the police officers. The CCRB supported the family claims, agreeing that excessive force was used and recommended that formal charges be brought against the officers. The CCRB sent its report to the Police Commissioner, who was said to have criticized the Board.

126. In addition, Anthony Baez, aged 29, Puerto Rican, was killed on 22 December 1994 by a police officer of the 46th Precinct in the Bronx who applied a chokehold on him. The officer who killed him had previously had 14 complaints of brutality lodged against him. According to the information received, the use of chokeholds was banned in 1993 by the New York Police Department (NYPD). Other police departments, such as those in San Francisco and Los Angeles, are said to continue using it if necessary to protect the lives of officers.

127. The **Special** Rapporteur was also informed about deaths committed as a result of the use of pepper spray. Pepper spray is a weapon that attacks the respiratory system. While it is meritorious that police look for strategies and weapons that do not cause injuries, pepper spray has raised concerns because several persons are said to have died due to its use. At least two individuals died in San Francisco after pepper spray was used. Aaron William, an AfricanAmerican, reportedly died in police custody after being beaten and peppersprayed by police officers. The **Special** Rapporteur was particularly shocked at the death of Sammy Marshall in San Quentin prison in California. Marshall, a 51year-old man, was on death row for murder. On 27 February 1997, the California Supreme Court reversed his death sentence. According to the information received, he was never informed about it. On 15 June, several guards allegedly entered his cell and asked him to come out. When he refused,

pepper spray was used, which reportedly caused his death.

128. The **Special** Rapporteur was informed about the existence of a **special** unit in the Los Angeles Police Department, known as the **Special** Investigation Section (SIS), created in 1965 and composed of a group of about 20 officers who are known to conduct controversial operations which have on many occasions resulted in deaths. According to the information received, on 12 February 1990 a McDonald's restaurant in the Sunland area of Los Angeles was robbed by four individuals while SIS members monitored the incident without intervening. Allegedly, once the four individuals had left the SIS agents opened fire as they were trying to leave in a car. Three of the robbers were killed and one was seriously injured. None of them was said to have fired any shots at the officers.

129. The existence of an independent civilian review system through which persons may file complaints of police misconduct offers the possibility of more impartiality. In New York, the CCRB was established in 1993. It is composed of 13 members appointed by the mayor, five of whom are chosen by the mayor, five by the City Council and three by the Police Commissioner. The Board is an independent, non-police agency with the power to investigate allegations of misconduct filed by citizens against NYPD officers. It has the power to receive, investigate, hear, make findings and recommend action on complaints concerning New York City police officers involving excessive or unnecessary use of force, abuse of authority and discourtesy or offensive language. Once a case has been investigated, the Board may recommend any of the following dispositions with regard to the complaint: substantiated (the officer actually committed the alleged act), unsubstantiated (not enough evidence), exonerated (the incident occurred but the actions of the officer were lawful), or unfounded (acts did not occur). In cases of killings, the CCRB can carry out an investigation even if Internal Affairs is also doing it. The CCRB reports its findings to the Police Commissioner, but it has no authority to guarantee that disciplinary action will be taken. This will be decided by the police department while the officer under investigation may continue to work.

130. All sources consulted have agreed that police departments in the United States have high written standards in regard to training and guidelines on the use of force. Principles reflected in the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979), as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, are reportedly fully reflected in police regulations. This is despite the fact that there is little, if any, awareness of the existence of these international standards. The **Special** Rapporteur is of the opinion that there is a need for federal authorities to take concrete measures to ensure that all levels of armed officials are trained and meet those standards.

131. It was difficult for the **Special** Rapporteur to obtain information concerning killings committed by the police in the United States. National data seemed not to be available. The **Special** Rapporteur was informed that there have been some attempts to collect national figures on police violence. The introduction in Congress of a bill called the Police Stop Statistics Act, which would require each individual police department to collect data on police stops, including whether a search was conducted or if violence was used, is an example.

132. The **Special** Rapporteur is aware of the dangerous situations that police officers face, and that the majority of confrontations which require use of force do not result in death, testimony to the degree of professionalism which exists in United States police departments. However, in many of the cases brought to his attention, the use of lethal force was said not to have been justified.

133. The low rate of criminal prosecution in cases of police brutality remains the principal cause for the perpetuation of violations of human rights by the police, in particular violations of the right to life. The manner in which a Government reacts to human rights violations committed by its agents, through action or omission, clearly shows the degree of its willingness to ensure effective protection of human rights. States have the obligation to conduct exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish the perpetrators, to grant adequate compensation to the victims or their families, and to take effective measures to avoid the recurrence of such violations.

134. The fact that few police officers are subject to criminal prosecution for abuse of force resulting in death has been attributed to several factors, as described below:

135. Lack of proper investigations. On many occasions police misconduct - including killings caused by police - is investigated by an Internal Affairs Department (internal system for dealing with complaints and allegations of misconduct) within the police. According to the information received, they do not have independent subpoena power to call witnesses and compel their participation in proceedings. The District Attorney's Office generally receives notice of every shooting, but it does not necessarily get involved. The fact that it is the police department that investigates a shooting in which police officers were involved creates a conflict of interest. In most cases, police officers are not permanently assigned to the Internal Affairs Department; they work there for some years and then go back to the regular police force. It would be unrealistic to expect impartiality from those who conduct investigations against colleagues, particularly when their positions may later be reversed. Unless there is an independent oversight, these cases will not be properly investigated. This is why it is very important to have an independent body to investigate complaints against the police.

136. Compensation for damages does not generally come from the Police Department. The fact that money paid for damages normally does not come from police departments but from the municipality does not act as an incentive for the police department and allows the situation to be perpetuated. The **Special** Rapporteur was informed that in some police departments, such as in San Francisco, the situation has changed and that money comes from the police department itself. Consultations in this direction are also said to be under way in New York city.

137. Political influence of police in the country. Police unions in the United States are reported to be an important political entity. Not only do they represent their members, but they also make political endorsements. Politicians, when running for election, including for president, are particularly interested in receiving support from police unions because they are perceived as being "tough" on crime. In the context of misconduct, police are likely to benefit from political protection. At the federal level, there has reportedly been a lack of interest in investigating police misconduct. Criminal prosecution is rare for similar political reasons: local district attorneys who run for office need support from police unions. In addition, the district attorney depends on the police department to conduct investigations. Unlike in many countries, the police in the United States are structurally independent of the judge as well as of the prosecutor's office. Therefore, prosecutors must always be aware, even as they seek to prosecute abusive police, that they will require the cooperation of these same police in all future criminal investigations and prosecutions. Therefore, it is allegedly difficult for a district attorney to decide to bring charges against a police officer. The district attorney must decide whether there is sufficient evidence to bring the case before a grand jury, which makes the decision whether or not the evidence justifies bringing an indictment.

138. It has also been brought to the attention of the **Special** Rapporteur that the standards of criminal

liability for police are very high. Hence, not only does it have to be proven whether the officer used unreasonable force, but also whether he intended to use it. In many cases, the intention to use excessive force is difficult to prove.

139. The **Special** Rapporteur has further been informed that the Justice Department has the power to investigate entire police departments for patterns and practices of misconduct and can require certain practices to be changed. In New York City, the Justice Department intervened only after the Abner Louima case. [back to the contents]

V. CONCLUSIONS AND RECOMMENDATIONS

"Where, after all, do universal rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world ... . Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world." Eleanor Roosevelt

A. Concerning the use of the death penalty

140. The **Special** Rapporteur shares the view of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the law of the United States. He is of the opinion that the reservation entered by the United States on the death **penalty** provision is incompatible with the object and purpose of the treaty and should therefore be considered void.

141. Not only do the reservations entered by the United States seriously reduce the impact of the ICCPR, but its effectiveness nationwide is further undermined by the absence of active enforcement mechanisms to ensure its implementation at state level.

142. The **Special** Rapporteur is of the view that a serious gap exists between federal and state governments, concerning implementation of international obligations undertaken by the United States Government. He notes with concern that the ICCPR appears not to have been disseminated to state authorities and that knowledge of the country's international obligations is almost nonexistent at state level. Further, he is of the opinion that the Federal Government cannot claim to represent the states at the international level and at the same time fail to take steps to implement international obligations accepted on their behalf.

143. The **Special** Rapporteur is aware of the implications of the United States system of federalism as set out in the Constitution and the impact that it has on the laws and practices of the United States. At the same time, it is clear that the Federal Government in undertaking international obligations also undertakes to use all of its constitutionally mandated powers to ensure that the human rights obligations are fulfilled at all levels.

144. The **Special** Rapporteur questions the overall commitment of the Federal Government to enforce international obligations at home if it claimed not to be in a position to ensure the access of United Nations experts such as **special** rapporteurs to authorities at state level. He is concerned that his visit revealed little evidence of such a commitment at the highest levels of the Federal Government.

145. The **Special** Rapporteur believes that the current practice of imposing death sentences and

executions of juveniles in the United States violates international law. He further believes that the reintroduction of the death **penalty** and the extension of its scope, both at federal and at state level, contravene the spirit and purpose of article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death **penalty** may be imposed. He is further concerned about the execution of mentally retarded and insane persons which he considers to be in contravention of relevant international standards.

146. The **Special** Rapporteur deplores these practices and considers that they constitute a step backwards in the promotion and protection of the right to life.

147. Because of the definitive nature of a death sentence, a process leading to its imposition must comply fully with the highest safeguards and fair trial standards, and must be in accordance with restrictions imposed by international law. The **Special** Rapporteur notes with concern that in the United States, guarantees and safeguards, as well as specific restrictions on capital punishment, are not being fully respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing. The enactment of the 1996 Anti-terrorism and Effective Death **Penalty** Act and the lack of funding of PCDOs have further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments.

148. Despite the excellent reputation of the United States judiciary, the **Special** Rapporteur observes that the imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death. As Justice Marshall stated in Godfrey v. Georgia, "The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system - and perhaps any criminal justice system - is unable to perform".

149. The politics behind the death **penalty**, particularly during election campaigns, raises doubts as to the objectivity of its imposition. The **Special** Rapporteur believes that the system of election of judges to relatively short terms of office, and the practice of requesting financial contributions particularly from members of the bar and the public, may risk interfering with the independence and impartiality of the judiciary. Further, the discretionary power of the prosecutor as to whether or not to seek the death **penalty** raises serious concern regarding the fairness of its administration.

150. The process of jury selection may also be tainted by racial factors and unfairness. The **Special** Rapporteur notes with concern that people who are opposed to or have hesitations about the death **penalty** are unlikely to sit as jurors and believes that a "death qualified" jury will be predisposed to apply the harshest sentence. He fears that the right to a fair trial before an impartial tribunal may be jeopardized by such juries. Moreover, he is convinced that a "death qualified" jury does not represent the community conscience as a whole, but only the conscience of that part of the community which favours capital punishment.

151. The high level of support for the death **penalty**, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings and lynchings enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice". Yet they are not acceptable in any civilized society.

152. While acknowledging the difficulties that authorities face in fighting violent crime, he believes that solutions other than the increasing use of the death **penalty** need to be sought. Moreover, the

inherent cruelty of executions might only lead to the perpetuation of a culture of violence.

153. The **Special** Rapporteur is particularly concerned by the current approach to victims' rights. He considers that while victims are entitled to respect and compassion, access to justice and prompt redress, these rights should not be implemented at the expenses of those of the accused. Courts should not become a forum for retaliation. The duty of the State to provide justice should not be privatized and brought back to victims, as it was before the emergence of modern States.

154. While the **Special** Rapporteur would hope that the United States would join the movement of the international community towards progressively restricting the use of the death **penalty** as a way to strengthen the protection of the right to life, he is concerned that, to the contrary, the United States is carrying out an increasing number of executions, including of juveniles and mentally retarded persons. He also fears that executions of women will resume if this trend is not reversed.

155. The **Special** Rapporteur wishes to emphasize that the use of the death **penalty** in violation of international standards will not help to resolve social problems and build a more harmonious society but, on the contrary, will contribute to exacerbated tensions between races and classes, particularly at a moment when the United States is proclaiming its intention to combat racism more vigorously.

156. In view of the above, the **Special** Rapporteur recommends the following to the Government of the United States:

(a) To establish a moratorium on executions in accordance with the recommendations made by the American Bar Association and resolution 1997/12 of the Commission on Human Rights;

(b) To discontinue the practice of imposing death sentences on juvenile offenders and mentally retarded persons and to amend national legislation in this respect to bring it into conformity with international standards;

(c) Not to resume executions of women and respect the de facto moratorium in existence since 1984;

(d) To review legislation, both at federal and state levels, so as to restrict the number of offences punishable by death. In particular, the growing tendency to reinstate death **penalty** statutes and the increase in the number of aggravating circumstances both at state and federal levels should be addressed in order not to contravene the spirit and purpose of article 6 of the ICCPR and the goal expressed by the international community to progressively restrict the number of offences for which the death **penalty** is applied;

(e) To encourage the development of public defender systems so as to ensure the right to adequate legal representation for indigent defendants; to reinstate funding for legal resource centres in order to guarantee a more appropriate representation of death row inmates, particularly in those states where a public defender system does not exist. This would also help to diminish the risk of executing innocent persons;

(f) To take steps to disseminate and educate government officials at all levels as well as to develop monitoring and appropriate enforcement mechanisms to achieve full implementation of the provisions of the ICCPR, as well as other international treaties, at state level;

(g) To include a human rights component in training programmes for members of the judiciary. A

campaign on the role of juries could further aim at informing the public about the responsibilities of jurors;

(h) To review the system of election of members of the judiciary at state level, in order to ensure a degree of independence and impartiality similar to that of the federal system. It is recommended that in order to provide a greater degree of independence and impartiality that judges be elected for longer terms, for instance 10 years or for life;

(i) In view of the above, to consider inviting the **Special** Rapporteur on the independence of judges and lawyers to undertake a visit to the United States;

(j) To develop an intensive programme aimed at informing state authorities about international obligations undertaken by the United States and at bringing national laws into conformity with these standards; to increase the cooperation between the Department of Justice and the Department of State to disseminate and enforce the human rights undertakings of the United States;

(k) To lift the reservations, particularly on article 6, and the declarations and understandings entered to the ICCPR. The **Special** Rapporteur also recommends that the United States ratify the Convention on the Rights of the Child. He further recommends that the United States consider ratifying the first and second Optional Protocols to the ICCPR. [back to the contents]

B. Concerning killings by the police

157. The **Special** Rapporteur is concerned by the reports of violations of the right to life as a result of excessive use of force by law enforcement officials which he received during his mission, and he will continue to monitor the situation closely.

158. While acknowledging that the police face extremely difficult situations in their daily work, authorities have an obligation to ensure that the police respect the right to life.

159. Preliminary recommendations to the Government of the United States include the following:

(a) All alleged violations of the right to life should be investigated, police officials responsible brought to justice and compensation provided to the victims. Further, measures should be taken to prevent recurrence of these violations;

(b) Patterns of use of lethal force should be systematically investigated by the Justice Department; (c) Training on international standards on law enforcement and human rights should be included in police academies. This is particularly relevant because the United States has taken a leading role in training police forces in other countries;

(d) Independent organs, outside the police departments, should be put in place to investigate all allegations of violations of the right to life promptly and impartially, in accordance with principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;

(e) In order to avoid conflict of interest with the local district attorney's office, **special** prosecutors should be appointed more frequently in order to conduct investigations into allegations of violations of the right to life, to identify perpetrators and bring them to justice. [back to the contents]

Notes

Annex (Reproduced in the language of submission only)

AS APPROVED BY THE ABA HOUSE OF DELEGATES 3 February 1997

AMERICAN BAR ASSOCIATION SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES SECTION OF LITIGATION SECTION OF TORT AND INSURANCE PRACTICE COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW MASSACHUSETTS BAR ASSOCIATION THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK NEW YORK STATE BAR ASSOCIATION

RECOMMENDATION

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death **penalty** until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death **penalty** cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death **Penalty** Cases" (adopted February 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);

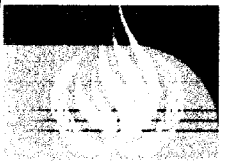
(ii) Preserving, enhancing and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state postconviction and federal habeas corpus proceedings (adopted August 1982, February 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted August 1988, August 1991); and

(iv) Preventing execution of mentally retarded persons (adopted February 1989) and persons who were under the age of 18 at the time of their offences (adopted August 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death **penalty**.

Office of the High Commissioner for Human Rights



Convention on the Rights of the Child

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

***entry into force* 2 September 1990, in accordance with article 49**

Status of ratifications
Declarations and reservations
Committee on the Rights of the Child

F I S I A I C I R

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their

national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts

with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by

inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information

concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 ***General comment on its implementation***

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems. (amendment)

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives

of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

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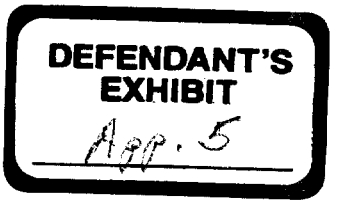

VIENNA CONVENTION ON THE LAW OF TREATIES*

The States Parties to the present Convention

Considering the fundamental role of treaties in the history of international relations,

Recognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,

Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized,

Affirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law,

Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained,

Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all,

Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of co-operation among nations,

Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

Have agreed as follows:

PART I

INTRODUCTION

Article 1

Scope of the present Convention

The present Convention applies to treaties between States.

Article 2

Use of terms

1. For the purposes of the present Convention:

   a. 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

   b. 'ratification', 'acceptance', 'approval' and 'accession' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

   c. 'full powers' means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;

   d. 'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

   e. 'negotiating State' means a State which took part in the drawing up and adoption of the text of the treaty;

   f. 'contracting State' means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

   g. 'party' means a State which has consented to be bound by the treaty and for which the treaty is in force;

   h. 'third State' means a State not a party to the treaty;

   i. 'international organization' means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3

International agreements not within the scope of the present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

   a. the legal force of such agreements;

b. the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

c. the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

Article 5

Treaties constituting international organizations and treaties adopted within an international organization

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

PART II

CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6

Capacity of States to conclude treaties

Every State possesses capacity to conclude treaties.

Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

a. he produces appropriate full powers; or

b. it appears from the practice of the States concerned or from other circumstances that

their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

a. Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

b. heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

c. representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8

Subsequent confirmation of an act performed without authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

a. by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

b. failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11

Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12

Consent to be bound by a treaty expressed by signature

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

a. the treaty provides that signature shall have that effect;

b. it is otherwise established that the negotiating States were agreed that signature should have that effect; or

c. the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

2. For the purposes of paragraph 1:

a. the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;

b. the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

Article 13

Consent to be bound by a treaty
expressed by an exchange of instruments constituting a treaty

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:

a. the instruments provide that their exchange shall have that effect; or

b. it is otherwise established that those States were agreed that the exchange of instruments should have that effect

Article 14

Consent to be bound by a treaty
expressed by ratification, acceptance or approval

1. The consent of a State to be bound by a treaty is expressed by ratification when:

   a. the treaty provides for such consent to be expressed by means of ratification;

   b. it is otherwise established that the negotiating States were agreed that ratification should be required;

   c. the representative of the State has signed the treaty subject to ratification; or

   d. the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Article 15

Consent to be bound by a treaty expressed by accession

The consent of a State to be bound by a treaty is expressed by accession when:

   a. the treaty provides that such consent may be expressed by that State by means of accession;

   b. it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

   c. all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Article 16

Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

   a. their exchange between the contracting States;

   b. their deposit with the depositary; or

   c. their notification to the contracting States or to the depositary, if 50 agreed.

Article 17

Consent to be bound by part of a treaty and choice of differing provisions

1. Without prejudice to articles 19 to 23, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made clear to which of the provisions the consent relates.

Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

a. it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

b. it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

SECTION 2. RESERVATIONS

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

a. the reservation is prohibited by the treaty;

b. the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

c. in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

a. acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

b. an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

c. an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

a. modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

b. modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

a. the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

b. the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation. 4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL APPLICATION OF TREATIES

Article 24

Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of

the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

   a. the treaty itself so provides; or

   b. the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

PART III

OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

SECTION 1. OBSERVANCE OF TREATIES

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

SECTION 2. APPLICATION OF TREATIES

Article 28

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with

respect to that party.

Article 29

Territorial scope of treaties

Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.

Article 30

Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

a. as between States parties to both treaties the same rule applies as in paragraph 3;

b. as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a. any agreement relating to the treaty which was made between all the parties in

connexion with the conclusion of the treaty;

b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c. any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a. leaves the meaning ambiguous or obscure; or

b. leads to a result which is manifestly absurd or unreasonable.

Article 33

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having

regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34

General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 35

Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36

Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Article 37

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.

2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

Article 38

Rules in a treaty becoming binding on third States through international custom

Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.

PART IV

AMENDMENT AND MODIFICATION OF TREATIES

Article 39

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

a. the decision as to the action to be taken in regard to such proposal;

b. the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

a. be considered as a party to the treaty as amended; and

b. be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify

the treaty as between themselves alone if:

a. the possibility of such a modification is provided for by the treaty; or

b. the modification in question is not prohibited by the treaty and:

i. does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

ii. does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

PART V

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

SECTION 1. GENERAL PROVISIONS

Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44

Separability of treaty provisions

1. A right of a party, provided for in a treaty or arising under article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercised only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

a. the said clauses are separable from the remainder of the treaty with regard to their application;

b. it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

c. continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under articles 49 and 50 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

a. it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

b. it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

SECTION 2. INVALIDITY OF TREATIES

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47

Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.

Article 49

Fraud

If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50

Corruption of a representative of a State

If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51

Coercion of a representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52

Coercion of a State by the threat or use of force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54

Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

a. in conformity with the provisions of the treaty; or

b. at any time by consent of all the parties after consultation with the other contracting States.

Article 55

Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into

force.

Article 56

Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

a. it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

b. a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57

Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

a. in conformity with the provisions of the treaty; or

b. at any time by consent of all the parties after consultation with the other contracting States.

Article 58

Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

a. the possibility of such a suspension is provided for by the treaty; or

b. the suspension in question is not prohibited by the treaty and:

i. does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

ii. is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in

question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59

Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

a. it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

b. the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

a. the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

i. in the relations between themselves and the defaulting State, or

ii. as between all the parties;

b. a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

c. any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

a. a repudiation of the treaty not sanctioned by the present Convention; or

b. the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

a. the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

b. the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

a. if the treaty establishes a boundary; or

b. if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Article 63

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

SECTION 4. PROCEDURE

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

a. any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

b. any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annexe to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65 paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

Article 68

Revocation of notifications and instruments provided for in articles 65 and 67

A notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

a. each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

b. acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70

Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

a. releases the parties from any obligation further to perform the treaty;

b. does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

a. eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

b. bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the

termination of the treaty:

a. releases the parties from any obligation further to perform the treaty;

b. does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72

Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

a. releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;

b. does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI

MISCELLANEOUS PROVISIONS

Article 73

Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

PART VII

DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

Article 76

Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.

2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

Article 77

Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

a. keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

b. preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

c. receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

d. examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

e. informing the parties and the States entitled to become parties to the treaty of acts,

notifications and communications relating to the treaty;

f. informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

g. registering the treaty with the Secretariat of the United Nations;

h. performing the functions specified in other provisions of the present Convention.

2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.

Article 78

Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

a. if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

b. be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

c. if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e).

Article 79

Correction of errors in texts or in certified copies of treaties

1. Where, after the authentication of the text of a treaty, the signatory States and the contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

a. by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

b. by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

c. by executing a corrected text of the whole treaty by the same procedure as in the case

of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

a. no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procŠs-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

b. an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting Slates.

Article 80

Registration and publication of treaties

1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

2. The designation of a depositary shall constitute authorization for it to perform the acts specified in the preceding paragraph.

PART VIII

FINAL PROVISIONS

Article 81

Signature

The present Convention shall be open for signature by all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency

or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the United Nations to become a party to the Convention, as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

Article 82

Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 83

Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 84

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 85

Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by

the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

a. one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

b. one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character

than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

* Vienna Convention on the law of treaties (with annex) was concluded at Vienna on 23 May 1969 and came into force on 27 January 1980.

than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

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* Vienna Convention on the law of treaties (with annex) was concluded at Vienna on 23 May 1969 and came into force on 27 January 1980.

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Rights of the child

Commission on Human Rights resolution 2001/75

The Commission on Human Rights,

Bearing in mind the Convention on the Rights of the Child, emphasizing that its provisions and other relevant human rights instruments must constitute the standard in the promotion and protection of the rights of the child, and reaffirming that the best interests of the child shall be the primary consideration in all actions concerning children,

Welcoming the developments in recent years in international legal standards, especially the adoption of the Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, the 1999 Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour (No. 182) of the International Labour Organization, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, acknowledging the historic significance of the establishment of the Rome Statute of the International Criminal Court (A/CONF.183/9), and noting with interest the entry into force of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Reaffirming the consensus reached in the relevant resolutions of the fifty-sixth session of the Commission and the fifty-fifth session of the General Assembly, as well as in all previous resolutions on this subject,

Reaffirming also the fundamental principle set forth in the Vienna Declaration and Programme of Action adopted in June 1993 by the World Conference on Human Rights (A/CONF.157/23) and in the Beijing Declaration and Platform for Action, adopted in September 1995 by the Fourth World Conference on Women (A/CONF.177/20, chap. I) that the human rights of women and girls are an inalienable, integral and indivisible part of universal human rights, and underlining the need for further mainstreaming the rights of the child as well as a gender perspective in all policies and programmes relating to children,

Reaffirming further the World Declaration on the Survival, Protection and Development of Children and the Plan of Action for the Implementation of the World Declaration for the Survival, Protection and Development of the Child in the 1990s adopted in September 1990 by the World Summit for Children (A/45/625, annex) and the Vienna Declaration and Programme of Action, which, *inter alia*, state that national and international mechanisms and programmes for the safeguard and protection of children, in particular those in especially difficult circumstances, should be strengthened, including through effective measures to combat exploitation and abuse of children, female infanticide, harmful child labour and the immediate elimination of its worst forms, sale of children and organs, child prostitution and child pornography, as well as other forms of sexual abuse, and which reaffirm that all human rights and fundamental freedoms are universal,

Welcoming the role of the Committee on the Rights of the Child in examining the progress made by States parties in implementing the obligations undertaken in the Convention on the Rights of the Child, and in providing recommendations to States parties on its implementation and, in cooperation with the Office of the United Nations High Commissioner for Human Rights, in enhancing awareness of the principles and provisions of the Convention,

Profoundly concerned that the situation of children in many parts of the world remains critical as a result of the persistence of poverty, inadequate social and economic conditions in an increasingly globalized world economy, pandemics, in particular the human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS), natural disasters, armed conflicts, displacement, exploitation, illiteracy, hunger, intolerance, discrimination, disability and inadequate legal protection, and convinced that urgent and effective national and international action is called for,

Alarmed by the reality of daily violations of children's rights, including the right to life, to physical security and to freedom from arbitrary detention, torture and any form of exploitation, as well as economic, social and cultural rights, as laid out in relevant international instruments,

Supporting the preparatory process for the special session of the General Assembly to be convened in September 2001 to follow up the World Summit for Children and encouraging States to participate actively therein in order to promote an effective review of progress made, as well as the identification of obstacles affecting the full implementation of the outcome of the World Summit, as a reaffirmation of their commitment to the rights of the child, and encouraging the establishment of forward-looking strategies, taking into account a strong child rights approach,

Welcoming the integration of child-related issues into the preparations for and the outcome of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance to be held in September 2001,

Stressing the importance of taking into account a child rights approach in the preparations for the special session of the General Assembly on HIV/AIDS to be convened in June 2001 and the need for a concerted approach for children affected or infected by the pandemic, including those orphaned as a result of the HIV/AIDS pandemic, focusing in particular on the worst-hit regions in Africa, and to give importance to the treatment, care and support of children infected by HIV/AIDS,

Welcoming the reports of the Secretary-General on the status of the Convention on the Rights of the Child (E/CN.4/2001/74), of the Special Rapporteur on the right to education (E/CN.4/2001/52), of the Special Rapporteur on the sale of children, child prostitution and child pornography (E/CN.4/2001/78 and Add.1-2), of the Special Representative of the Secretary-General on the impact of armed conflict on children to the General Assembly at its fifty-fifth session (A/55/442) and to the Commission at its fifty-seventh session (E/CN.4/2001/76), and the report of the Secretary-General on children and armed conflict (A/55/163-S/2000/712),

Reaffirming that the family is the fundamental group of society and the natural environment for the growth and well-being of children, and recognizing that children should grow up in a family environment and social atmosphere of peace, respect, happiness, love and understanding,

Concerned at the number of illegal adoptions, of children growing up without parents and of child victims of family and social violence, neglect and abuse,

Mindful of the commitments made by heads of State and Government and the targets identified in the United Nations Millennium Declaration pertaining to the realization, promotion and protection of the

rights of the child,

Recognizing that partnership between Governments, international organizations, and relevant bodies and organizations of the United Nations system, in particular the United Nations Children's Fund, and all actors of civil society, in particular non-governmental organizations, as well as the private sector, is important to realize the rights of the child,

Welcoming the International Decade for a Culture of Peace and Non-Violence for the Children of the World (2001-2010) and the Declaration and Programme of Action on a Culture of Peace, which serve as the basis for the International Decade,

Welcoming also the convening of the Second World Congress against Commercial Sexual Exploitation of Children in Yokohama, Japan, in December 2001, and the regional consultation meetings,

I. IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD AND OTHER INSTRUMENTS

1. *Urges once again* the States that have not yet done so to consider signing and ratifying or acceding to the Convention on the Rights of the Child as a matter of priority, with a view to reaching the goal of universal adherence, and to consider signing and ratifying the Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography as a matter of priority so that they can enter into force as soon as possible, bearing in mind the convening of the special session of the General Assembly to follow up the World Summit for Children in September 2001;

2. *Reiterates its concern* at the great number of reservations to the Convention, and urges States parties to withdraw reservations incompatible with the object and purpose of the Convention and to consider reviewing other reservations with a view to withdrawing them;

3. *Calls upon* States parties to implement the Convention fully and to ensure that the rights set forth in the Convention are respected without discrimination of any kind, that the best interests of the child are a primary consideration in all actions concerning children, to recognize the child's inherent right to life and that the child's survival and development is ensured to the maximum extent possible, and that the child is able to express his/her views freely in all opinions on matters affecting him/her and that these views are listened to and given due weight in accordance with his/her age and maturity;

4. *Urges* States parties to take all appropriate measures for the implementation of the rights recognized in the Convention, bearing in mind article 4 of the Convention, by strengthening relevant governmental structures for children, including, where appropriate, ministers in charge of child issues and independent commissioners for the rights of the child;

5. *Calls upon* States parties:

(*a*) To accept, as a matter of priority, the amendment to article 43, paragraph 2, of the Convention regarding the extension of the Committee on the Rights of the Child from ten to eighteen members;

(*b*) To ensure that the members are of high moral standing and recognized competence in the field covered by the Convention, serving in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems;

(*c*) To comply in a timely manner with their reporting obligations under the Convention, in accordance

with the guidelines elaborated by the Committee, as well as to take into account the recommendations made by the Committee in the implementation of the provisions of the Convention and to strengthen their cooperation with the Committee;

6. *Requests* the Office of the United Nations High Commissioner for Human Rights, United Nations mechanisms, all relevant organs of the United Nations system, in particular special representatives, special rapporteurs and working groups regularly and systematically to include a child rights perspective in the fulfilment of their mandates, and calls upon States to cooperate closely with them;

7. *Reaffirms* the importance of ensuring adequate and systematic training in the rights of the child for law enforcement and other professions whose work has an impact on children, as well as coordination between various governmental bodies;

8. *Calls upon* all States to put an end to impunity, where applicable, for all crimes, including where children are victims, in particular those of genocide, crimes against humanity and war crimes, and to bring perpetrators of such crimes to justice;

9. *Calls upon* all States and relevant actors concerned to continue to cooperate with the special rapporteurs and special representatives of the United Nations system in the implementation of their mandates, requests the Secretary-General to provide them with appropriate staff and facilities from the United Nations regular budget, when this is in accordance with their respective mandates, invites States to continue to make voluntary contributions where appropriate, and urges all relevant parts of the United Nations system to provide them with comprehensive reporting to make the full discharge of the mandate possible;

10. *Decides*, with regard to the Committee, to request the Secretary-General to ensure the provision of appropriate staff and facilities from the United Nations regular budget for the effective and expeditious performance of the functions of the Committee, and invites the Committee to continue to enhance its constructive dialogue with the States parties and its transparent and effective functioning;

II. PROTECTION AND PROMOTION OF THE RIGHTS OF THE CHILD

Identity, family relations and birth registration

Reaffirming paragraph 15 of its resolution 2000/85 of 27 April 2000,

11. *Calls upon* all States:

(*a*) To continue to intensify efforts to ensure the registration of all children immediately after birth, including by the consideration of simplified, expeditious and effective procedures;

(*b*) To undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference and, where a child is illegally deprived of some or all of the elements of his or her identity, to provide appropriate assistance and protection with a view to re-establishing speedily his or her identity;

(*c*) To ensure as far as possible the right of the child to know and be cared for by his or her parents, and to ensure that a child shall not be separated from his or her parents against their will, except when the competent authorities, subject to judicial review, determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child, in conformity with article 9 of the Convention;

Health

Reaffirming paragraphs 16 to 19 of its resolution 2000/85,

12. *Calls upon* all States to take all appropriate measures to develop sustainable health systems and social services and to ensure access to such systems and services without discrimination, and to pay particular attention to adequate food and nutrition to prevent disease and malnutrition, to prenatal and post-natal health care, to special needs of adolescents, to reproductive and sexual health and to threats from substance abuse and violence, and calls upon all States parties to take all necessary measures to ensure the right of all children, without discrimination, to the enjoyment of the highest attainable standard of health in accordance with article 24 of the Convention;

13. *Also calls upon* all States to give support and rehabilitation to children and their families affected by HIV/AIDS, to involve children and their caregivers, as well as the private sector, to ensure the effective prevention of HIV infections through correct information and access to affordable, voluntary and confidential care, treatment and testing, giving due importance to the prevention of mother-to-child transmission of the virus;

Education

Reaffirming paragraphs 20 and 21 of its resolution 2000/85,

14. *Calls upon* all States:

(*a*) To recognize the right to education on the basis of equal opportunity by making primary education free and compulsory to all and ensuring that all children, including girls, children in need of special protection and indigenous children and children belonging to minorities, have access without discrimination to education of good quality, as well as making secondary education generally available and accessible to all, and in particular by the progressive introduction of free education, bearing in mind that affirmative action contributes to achieving equal opportunity and combating exclusion, and that the education of the child is carried out and that States parties develop and implement programmes for the education of the child in accordance with articles 28 and 29 of the Convention on the Rights of the Child;

(*b*) To take all appropriate measures to prevent racism and discriminatory and xenophobic attitudes and behaviour, through education, keeping in mind the important role that children play in changing these practices;

(*c*) To ensure that children, from an early age, benefit from education and from participation in activities which develop respect for human rights and emphasize the practice of non-violence with the aim of instilling in them the values and goals of a culture of peace;

15. *Reaffirms* the Dakar Framework for Action adopted by the World Education Forum in April 2000 and calls for its full implementation, and in this regard invites the United Nations Educational, Scientific and Cultural Organization to continue to implement its mandated role in coordinating Education for All partners and maintaining their collaborative momentum;

16. *Notes with interest* the recent adoption by the Committee on the Rights of the Child of General Comment No. 1 (2001) on the aims of education (art. 29, para. 1, of the Convention), as well as the adoption of general comments as a means of cooperating with States parties in the implementation of the Convention;

Freedom from violence

Reaffirming paragraphs 22 to 24 of its resolution 2000/85,

17. *Notes with appreciation* the initiative of the Committee on the Rights of the Child on State violence against children, welcomes the upcoming general discussion in September 2001 on the theme of violence suffered by children in schools and within the family, and welcomes the recommendation by the Committee that the Secretary-General should be requested, through the General Assembly, to conduct an in-depth study on the issue of violence against children, *inter alia* the different types of violent treatment of which children are victims, to identify their causes, the extent of such violence and its impact on children, and to put forward recommendations for action, including effective remedies and preventive and rehabilitation measures;

18. *Calls upon* all States to take all appropriate national, bilateral and multilateral measures to prevent all forms of violence against children and to protect them from torture and other forms of violence, physical violence including domestic violence, child abuse, mental and sexual violence, abuse by the police and other law enforcement authorities or by employees in juvenile detention centres, orphanages, childcare institutions and others, as well as violence in the street and in schools;

19. *Also calls upon* all States to investigate and submit cases of torture and other forms of violence against children to the competent authorities for the purpose of prosecution and to impose appropriate disciplinary or penal sanctions against those responsible for such practices;

III. NON-DISCRIMINATION

20. *Calls upon* all States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist not to deny to a child belonging to such a minority or who is indigenous the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language;

The girl child

Reaffirming paragraphs 26 to 28 of its resolution 2000/85,

21. *Calls upon* all States to take all necessary measures, including legal reforms where appropriate:

(*a*) To ensure the full and equal enjoyment by girls of all human rights and fundamental freedoms, to take effective actions against violations of those rights and freedoms and to base programmes and policies for the girl child on the rights of the child;

(*b*) To eliminate all forms of discrimination against girls, including all forms of violence, harmful traditional or customary practices, including female genital mutilation, the root causes of son preference, marriages without free and full consent of the intending spouses and early marriages, by enacting and enforcing legislation and, where appropriate, formulating comprehensive, multidisciplinary and coordinated national plans, programmes or strategies protecting girls;

Children with disabilities

Reaffirming paragraph 29 of its resolution 2000/85,

22. *Calls upon* all States to take all necessary measures to ensure the full and equal enjoyment of all

human rights and fundamental freedoms by children with disabilities and, where necessary, to develop and enforce legislation against their discrimination to ensure dignity, promote self-reliance and facilitate the child's active participation in the community, including adequate and effective access to education of good quality for children with disabilities and their parents, taking into account the situation of children with disabilities living in poverty;

Migrant children

Reaffirming paragraph 30 of its resolution 2000/85,

23. *Calls upon* all States to ensure, as appropriate, school access to migrant children, especially those who are unaccompanied, as well as access to the highest attainable standard of social services, particularly access to and provision of health care;

IV. PROTECTION AND PROMOTION OF THE RIGHTS OF CHILDREN IN PARTICULARLY DIFFICULT SITUATIONS

Children working and/or living on the street

Reaffirming paragraph 31 of its resolution 2000/85,

24. *Calls upon* all States to prevent arbitrary and summary executions, torture, all kinds of violence against and exploitation of children working and/or living on the street and other violations of their rights, and to bring the perpetrators to justice, to adopt and implement policies for the protection, rehabilitation and reintegration of these children, and to adopt economic and social solutions to address the problems of children working and/or living on the street;

Refugee and internally displaced children

Reaffirming paragraph 32 of its resolution 2000/85,

25. *Calls upon* all States to protect refugee children, unaccompanied children seeking asylum and internally displaced children, who are particularly exposed to risks in connection with armed conflict, such as recruitment, sexual violence and exploitation, to pay particular attention to programmes for voluntary repatriation, and wherever possible, local integration and resettlement, to give priority to family tracing and reunification, and, where appropriate, to cooperate with international humanitarian and refugee organizations;

Child labour

Reaffirming paragraphs 33 and 34 of its resolution 2000/85,

26. *Calls upon* all States to translate into concrete action their commitment to the progressive and effective elimination of child labour that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, and to the immediate elimination of the worst forms of child labour, to promote education as a key strategy in this regard, including the creation of vocational training and apprenticeship programmes and the integration of working children into the formal education system, as well as to examine and devise economic policies, where necessary, in cooperation with the international community, that address factors contributing to these forms of child labour;

27. *Calls upon* all States that have not yet done so to consider ratifying the 1999 Convention concerning the prohibition and immediate action for the elimination of the worst forms of child labour (No. 182) of the International Labour Organization;

Children alleged to have or recognized as having infringed penal law

Reaffirming paragraphs 35 and 36 (*a*) and (*d*) of its resolution 2000/85,

28. *Calls upon*:

(*a*) The Governments of all States, in particular States in which the death penalty has not been abolished, to comply with their obligations as assumed under relevant provisions of international human rights instruments, including in particular articles 37 and 40 of the Convention on the Rights of the Child and articles 6 and 14 of the International Covenant on Civil and Political Rights, keeping in mind the safeguards guaranteeing protection of the rights of those facing the death penalty and guarantees set out in Economic and Social Council resolutions 1984/50 of 25 May 1984 and 1989/64 of 24 May 1989;

(*b*) All States to take appropriate steps to ensure compliance with the principle that depriving children of their liberty should be used only as a measure of last resort and for the shortest appropriate period of time, in particular before trial, and to ensure that, if they are arrested, detained or imprisoned, children are separated from adults, to the greatest extent feasible, unless it is considered in their best interest not to do so, and also to take appropriate steps to ensure that no child in detention is sentenced to forced labour or deprived of access to and provision of health-care services, hygiene and environmental sanitation, education and basic instruction, taking into consideration the special needs of children with disabilities in detention, in accordance with their obligations under the Convention on the Rights of the Child;

V. PREVENTION AND ERADICATION OF THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

Reaffirming paragraphs 37 to 42 of its resolution 2000/85,

29. *Calls upon* all States:

(*a*) To take all appropriate national, bilateral and multilateral measures, *inter alia* to develop national laws, policies, programmes and practices and to collect comprehensive and disaggregated gender-specific data, to facilitate the participation of child victims of sexual exploitation in the development of strategies and to ensure the effective implementation of relevant international instruments concerning the prevention and the combat of trafficking and sale of children for any purpose or in any form, including the transfer of the organs of the child for profit, child prostitution and child pornography, and encourages all actors of civil society, the private sector and the media to cooperate in efforts to this end;

(*b*) To increase cooperation at all levels to prevent and dismantle networks trafficking in children;

(*c*) To criminalize and effectively penalize all forms of sexual exploitation and sexual abuse of children, including within the family or for commercial purposes, child pornography and child prostitution, child sex tourism and the use of the Internet for these purposes, while ensuring that, in the treatment by the criminal justice system of children who are victims, the best interests of the child shall be a primary consideration, and to take effective measures to ensure prosecution of offenders, whether local or foreign, by the competent national authorities, either in the offender's country of origin or in the country of destination, in accordance with due process of law;

(*d*) To combat the existence of a market that encourages such criminal practices against children, including through preventive and enforcement measures targeting customers or individuals who sexually exploit or sexually abuse children;

30. *Decides* to renew the mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography for a further three years, and requests the Special Rapporteur to submit a report to the Commission at its fifty-eighth session;

VI. PROTECTION OF CHILDREN AFFECTED BY ARMED CONFLICT

Reaffirming paragraphs 43 to 56 of its resolution 2000/85,

31. *Notes* the importance of the third debate held by the Security Council, on 26 July 2000, on children and armed conflict and the undertaking by the Council to give special attention to the protection, welfare and rights of children when taking action aimed at maintaining peace and security, and reaffirms the essential role of the General Assembly and the Economic and Social Council for the promotion and protection of the rights and welfare of children;

32. *Notes with appreciation* the Agenda for War-Affected Children adopted by the International Conference on War-Affected Children, held in Winnipeg, Canada, in September 2000, and efforts by regional organizations, in particular the Organization for Security and Cooperation in Europe, the European Union, the Economic Community of West African States, the Organization of American States and the Organization of African Unity, to include prominently the rights and protection of children affected by armed conflict in their policies and programmes;

33. *Notes* the adoption of the Rome Statute of the International Criminal Court (A/CONF.183/9), in particular the inclusion therein, as a war crime, of conscripting or enlisting children under the age of fifteen years or using them to participate actively in hostilities in both international and non-international armed conflicts;

34. *Calls upon* States:

(*a*) To end the use of children as soldiers contrary to obligations assumed under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and other relevant international human rights instruments;

(*b*) When ratifying the Optional Protocol, to raise the minimum age for voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention, bearing in mind that under the Convention persons under eighteen years of age are entitled to special protection, and to adopt safeguards to ensure that such recruitment is not forced or coerced;

(*c*) To ensure that children are not forcibly or compulsorily recruited into their armed forces;

(*d*) To take all feasible measures to prevent recruitment and use of children by armed groups, as distinct from the armed forces of a State, including the adoption of legal measures necessary to prohibit and criminalize such practices;

35. *Calls upon*:

(*a*) All States and other parties to armed conflict to respect fully international humanitarian law and, in

this regard, calls upon States parties to respect fully the provisions of the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977;

(*b*) All States and relevant United Nation bodies and agencies and regional organizations to integrate the rights of the child into all activities in conflict and post-conflict situations and to facilitate the participation of children in the development of strategies in this regard, making sure that there are opportunities for children's voices to be heard;

(*c*) All States and relevant United Nations bodies to continue to support national and international mine action efforts, including through financial contributions, mine awareness programmes, mine clearance, victim assistance and child-centred rehabilitation, taking note of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, and welcomes the positive effects on children of concrete legislative and other measures with respect to anti-personnel mines, and also taking note of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Amended Protocol II) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and the implementation of these instruments by those States that become parties to them;

36. *Recommends* that, whenever sanctions are imposed in the context of armed conflict, their impact on children be assessed and monitored and, to the extent that there are humanitarian exemptions, they be child-focused and formulated with clear guidelines for their application, in order to address possible adverse effects of the sanctions, and reaffirms the recommendations of the General Assembly and the International Conference of the Red Cross and the Red Crescent;

VII. RECOVERY AND SOCIAL REINTEGRATION

Reaffirming paragraph 57 of its resolution 2000/85,

37. *Encourages* States to cooperate, including through bilateral and multilateral technical cooperation and financial assistance, in the implementation of their obligations under the Convention on the Rights of the Child, including in the prevention of any activity contrary to the rights of the child and in the rehabilitation and social integration of the victims, such assistance and cooperation to be undertaken in consultation among concerned States and other relevant international organizations;

VIII.

38. *Decides:*

(*a*) To request the Secretary-General to submit to the Commission at its fifty-eighth session a report on the rights of the child, with information on the status of the Convention on the Rights of the Child and on the problems addressed in the present resolution;

(*b*) To continue its consideration of this question at its fifty-eighth session under the same agenda item.

79th meeting
25 April 2001
[Adopted without a vote. .]

DEFENDANT'S EXHIBIT App. 7

THE UNITED NATIONS

Distr.
GENERAL
E/CN.4/SUB.2/RES/2000/17
August 17, 2000
FRENCH
Original: ENGLISH

The death penalty being the delinquent minors

Resolution of the Sub-commission of the humans right 2000/17

The Sub-commission of the promotion and the protection of the humans right ,

Reaffirming the evolution in favour of the abolition of the death penalty in general, in accordance with paragraph 2 of article 6 of the international Pact relating to the civil laws and political and the second optional Protocol referring themselves to it, aiming at abolishing the death penalty, with the Protocol No 6 with the European Convention of safeguard of the humans right and of fundamental freedoms relating to abolition of the death penalty, to paragraphs 2 and 3 of article 4 of American Convention relating to the humans right and the Protocol with American Convention relating to the humans right dealing with the abolition of the death penalty,

Recalling resolutions 1998/8, on April 3, 1998, 1999/61, on April 28, 1999, and 2000/65, on April 26, 2000, of Commission of humans right, in which the Commission declared itself convinced that the abolition of the death penalty contributed to the reinforcement of human dignity and the progressive widening of the humans right,

Noting that the death penalty is often imposed at the end of lawsuits which are not in conformity with the international standards as regards equity and which members of racial minorities, national or ethniques seem in a disproportionate way to be condemned to the death penalty,

Being pleased with the tendency, in the States favorable to the maintenance of the death penalty, to limit the number of infringements which carry the death penalty,

Also being pleased owing to the fact that much country, while maintaining the death penalty in their penal legislation, applies a moratorium to the executions,

Pointing out the opinion of the Commission of the humans right according to whom the death penalty should not be imposed or applied to people reached of an arbitrary form of psychosis,

Reaffirming the prohibition of the application of the death penalty to old people of less than 18 years at the time of the commission of the crime, as devoted to paragraph 5 of article 6 of the international Pact relating to the civil laws and political, the subparagraph a) of article 37 of the Convention on the rights of the child, paragraph 3 of article 5 of the African Charter of the rights and the wellbeing of the child, in paragraph 5 of article 77 of Protocol I and in paragraph 4 of article 6 of Protocol II additional with Conventions of Geneva of August 12, 1949,

Affirming that the imposition of the death penalty to the old people of less than 18 years at the time of the commission of the crime is against the usual international law,

1. Categorically condemn the imposition and the application of the death penalty to old people of less than 18 years at the time of the commission of the crime;

2. Urge all the States which maintain the death penalty for the delinquent minors to abolish it, by the legislative way, as soon as possible, for the old people of less than 18 years at the time of the commission of the crime and, meanwhile, to recall to the judges that the imposition of the death penalty to the minor delinquents constitutes a violation of the international law;

3. Urge all the States, in which the death penalty was imposed to an old person of less than 18 years at the time of the commission of the crime after the State ratified the Convention on the rights of the child and/or after the entry into force of the national legislation abolishing the imposition of the death penalty for the delinquent minors, to recall to the judges that the imposition of the death penalty to the delinquent minors constitutes a violation of the international law and/or national;

4. Ask the Commission humans right to reaffirm the resolution 2000/65 which it adopted with its fifty-seventh session;

5. Decide to continue the examination of this question to its fifty-third session with the title of the same item on the agenda;

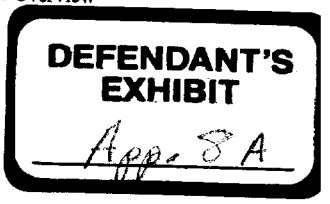
6. Recommend to the Commission humans right to adopt the draft decision hereafter:

"the Commission of the humans right, pointing out his resolutions 1998/8, on April 3, 1998, 1999/61, on April 28, 1999, and 2000/65, on April 27, 2000, on the question of the death penalty, as pointing out resolution 1999/4 of the Sub-commission, on August 24, 1999, on the death penalty, in particular being the delinquent minors, fascinating notes resolution 2000/17 of the Sub-commission on August 17, 2000, on the death penalty being the delinquent minors, confirms as the international law establishes clearly, with regard to the imposition of death penalty in the case of the minors, that the imposition of the death penalty to old people of less than eighteen years at the time of the commission of the crime constitutes a violation of the usual international law."

26th meeting

August 17, 2000

[Adopted without vote.]



REPORT NO 62/02
CASE NO 12.285
MICHAEL DOMINGUES
UNITED STATES

DECISION OVERVIEW

HOLDING

The Inter-American Commission on Human Rights held that sentencing a juvenile offender to the death penalty violated an international norm of *jus cogens*. Consequently should the state execute a juvenile pursuant to such a sentence it would be responsible for a grave and irreparable violation of the right to life under Article I of the American Declaration of the Rights and Duties of Man.

DECISION SUMMARY

On October 22 2002, the Inter-American Commission on Human Rights (IACHR) concluded that the prohibition against the execution of juveniles (under the age of 18 at the time of the offense) was now of a sufficiently indelible nature to constitute a norm of *jus cogens*. As the IACHR explained norms of *jus cogens* "derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence."[1]

Further the IACHR found that "by persisting in the practice of executing offenders under the age 18, the US stands alone amongst the traditional developed world nations and those of the inter-American system, and has been increasingly isolated within the entire global community."[2] The Commission continued to find such executions to be 'inconsistent with prevailing standards of decency.'[3]

Correspondingly it was held that the United States of America acted contrary to an international norm of *jus cogens* by sentencing Michael Domingues to death for a crime committed whilst a juvenile (an offender under the age of 18 at the time of the crime). The Commission further held that should the United States execute Mr. Domingues pursuant to this sentence, it would constitute a 'grave and irreparable violation' of Mr. Domingues' right to life under Article I of the American Declaration.[4]

DECISION CONTEXT

In August 1994 Michael Domingues, a U.S. citizen, was tried and convicted in the state of Nevada of one count of first degree murder, one count of first degree murder with the use of a deadly weapon, one count of burglary and one count of robbery with the use of a deadly weapon.

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[1] *Domingues*, paragraph
[2] *Domingues*, paragraph 84
[3] *Ibid*
[4] *Domingues*, paragraph 5

Subsequently, on each count of murder, Domingues was sentenced to death. Domingues was 16 years of age at the time of the offense and 17 when sentenced. Domingues appealed his death sentence to the Nevada state trial court which denied the motion.

On appeal to the Nevada Supreme Court, Domingues filed a motion for correction of an 'illegal' sentence, arguing that the execution of a juvenile constituted a violation of the International Covenant of Civil and Political Rights and customary international law. The Nevada Supreme Court chose to review the sole issue as to whether Nevada state law was superseded by the ICCPR. The Court concluded that the United States' express reservation to the ICCPR by the U.S. permitted the execution of juvenile offenders. The Nevada Supreme Court failed, however, to address the validity of the reservation or whether the execution of those under the age of 18 violated customary international law. On March 3, 1999, Domingues filed a petition for writ of certiorari to the U.S. Supreme Court. The writ alleged violations of the ICCPR, customary international law and *jus cogens*. The U.S. Supreme Court denied cert on November 1, 1999, without giving reasons.

Following this a petition to the IACHR was made on Domingues's behalf on May 1 2000. A subsequent petition on Domingues' behalf was then filed on December 8 2000 and the two petitions were consolidated. The petition alleged, that by sentencing Domingues to death for a crime committed while he was a juvenile the United States was in breach of Articles I (right to life), II (right to equality before the law), VII (right to protection for mothers and children) and XXVI (right to due process of law). Further, Domingues submitted that the United States acted in violation of Article I because of an international norm of *jus cogens*, prohibiting the execution of juvenile offenders.

DECISION RATIONALE

In 1987 the IACHR decided in the case of *Roach and Pinkerton v United States*[5] that a norm of *jus cogens* existed prohibiting the execution of children, however, it found that an uncertainty existed regarding the age of majority and therefore concluded that a norm of *jus cogens* did not exist prohibiting the execution of a person under 18 years of age. From examining developments in the *corpus juris* of international human rights law and state practice since 1987, the IACHR concluded that a consensus of 18 as the age of majority and hence, a norm of *jus cogens* prohibiting the application of the death penalty to those under 18, had emerged.

OBJECTIVE SOURCES OF CONSIDERATION

In interpreting and applying the American Declaration, the IACHR re-iterated the necessity to consider the provisions in the 'context of broader international and inter-American human rights systems.'[6] Further, it emphasized the respect to be given to developments in the *corpus juris gentium* of international human rights law, including the provisions of other international instruments, customary international law and norms of *jus cogens*.[7]

Correspondingly, the Commission noted that Article I of the declaration, (the right to life) must be evaluated in the context of such developments since 1987. The Commission looked at treaties,

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[5] *James Terry Roach and Jay Pinkerton v United States* Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87

[6] *Domingues*, paragraph 44

[7] *Ibid.*

United Nations Resolutions and Standards, the domestic practice of States, practice of the United States and other related developments regarding the age of majority to determine the nature or existence of a prohibition against executing those under the age of 18.

Treaty Developments

In examining treaty provisions and developments, the IACHR concluded that there has been, since 1987, and consistent with events prior to that date, a 'concordant and widespread development and ratification of treaties, by which nearly all of the world states have recognized, without reservation, a norm prohibiting the execution of individuals who were under 18 years of age at the time of their offense.'[8] The most significant development was held to be that of the adoption in 1989, by the U.N. General Assembly of the United Nations Convention on the Rights of the Child. Article 37(a) of the Convention explicitly prohibits the application of the death penalty to those under the age of 18.

It noted that the extent of ratification (191 state parties) of 'this instrument alone constitute[d] compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age.'[9] Further support for this was found by the IACHR in the lack of explicit reservations taken to Article 37(a).

Also of importance to the IACHR's finding of consensus, were developments relating to the International Covenant on Civil and Political Rights (ICCPR). The IACHR noted that since 1986, a further 64 states had acceded to or ratified the ICCPR, including the United States. Article 6(5) of the ICCPR specifically prohibits the application of the death penalty to those under 18 years of age. Noting that only two states have currently asserted reservations to Article 6(5); the U.S. and Thailand, the IACHR felt it 'noteworthy'[10] that the US reservation provoked widespread condemnation within the international community and prompted eleven European States Parties to file objections declaring the reservation to be invalid on grounds of inconsistency with the aims and purposes of the ICCPR. Further the IACHR noted the U.N Human Right's Committee's declaration of the reservation by the US to be contrary to the object and purpose of the ICCPR and it's recommendation to the US to withdraw it.

In relation to establishing a regional consensus, the IACHR drew heavily upon the provisions of the American Convention on Human Rights and the prohibition of the applicability of the death penalty to those aged under 18 within Article 4. The IACHR concluded that the existence of 24 state parties to the American Convention, including those member states that retained the death penalty, indicated a broad hemispheric adherence to the provisions of the Convention. Correspondingly such adherence constituted 'compelling evidence of a regional norm repudiating the application of the death penalty to persons under 18 years of age.'[11]

Further developments in both the inter-American and European systems since 1987 were also found to be of relevance to determining developments in the corpus of international human rights law. These included the approval by the OAS General Assembly of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, in 1990 and subsequent ratification by 8 states and Protocol No. 6 to the European Convention on Human Rights concerning the

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[8] *Domingues*, paragraph 68
[9] *Domingues*, paragraph 57
[10] *Domingues*, paragraph 62
[11] *Domingues*, paragraph 64

Abolition of the Death Penalty which came into force in 1985. Protocol No 6 abolished the death penalty entirely except in times of war. Since 1985 it had been ratified by 39 States, with three state signatories and Turkey standing alone as the only member state of the Council of Europe state which had not signed the protocol. Further, the increased ratification of the Fourth Geneva Convention of 1949, which, prohibits the imposition of the death upon those under 18 years of age in times of armed conflict or occupation[12] contributed heavily to the IACHR's conclusion that there could be no 'appropriate justification for applying a more restrictive standard for the application of death penalty to juveniles in times of occupation than in times of peace.'[13]

United Nations Resolutions and Standards

The IACHR found the developments within the law of treaties to be supported by developments within the United Nations.[14] The IACHR cites various resolutions and practices, including the Resolution on The Death penalty, Pertaining in Relation to Juveniles; The Resolution on The Question of the Death penalty and standards adopted by the United Nations Economic and Social Council, General Assembly; the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, all of which prohibit the execution of juvenile offenders.

Domestic Practice of States

The IACHR found the 'articulation of an international norm proscribing the execution of juvenile offenders through international practice' to be 'accompanied by the expression of a similar standard in domestic practice of states.'[15] The IACHR examined both State domestic practice in relation to the death penalty in general and the death penalty as it pertains to those under the age of 18. The IACHR cited statistics compiled by Amnesty International indicating that the rate of countries abolishing the death penalty had increased from 1.5 countries (1965-1988) to 4 (1989-1995) per year. Further they noted a huge increase in abolishment of the death penalty (49 countries) between 1986 and 2001, with a further 20 who had not actually carried out an execution.

In relation to the juvenile death penalty, the IACHR again cited Amnesty in stating that 115 States prohibit the application of the death penalty to juveniles and that since 1998 only three states persist in executing those under the age of 18 at the time of the offense, the U.S., Iran and Congo. Drawing upon regional practices, the IACHR felt it pertinent to note that only the U.S within the inter-American system continues in this practice, further reinforcing 'the existence of a particularly pervasive regional norm repudiating the application of the death penalty to persons under 18 years of age.'[16]

Notably, the IACHR found such developments to evidence 'a nearly unanimous and unqualified international trend towards prohibiting the execution of offenders under he age of 18'[17] and further that such a 'trend crosses political and ideological lines and has nearly isolated the U.S. as

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[12] Article 68, paragraph 4, Fourth Geneva Convention
[13] *Domingues*, paragraph 67
[14] *Domingues*, paragraph 69
[15] *Domingues*, paragraph 72
[16] *Domingues*, paragraph 75
[17] *Domingues*, paragraph 76

the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders.'[18]

Practice of the United States

The IACHR recognized not only the number of states which have adopted legislation prohibiting the application of the death penalty to juveniles (16 post 1986, 10 pre 1986), but also the initiative of the Supreme Court in Thompson v Oklahoma in concluding that it would 'offend civilized standards of decency to execute a person who was less than 16 years of age at the time of his or her offense' and subsequent legislative moves towards a higher standard such as the states of Florida and Montana.[19] The IACHR further considered it significant that the U.S. federal government considers the minimum age for the purposes of federal capital crimes to be 18. Articulating the significance of this, the IACHR noted the responsibility of the US government to uphold the State's obligations under the American Declaration and other international instruments and hence considered it indicative, by the U.S itself, of the appropriate standard for the application of the death penalty. These developments, both in regard to judicial determinations and legislative initiatives within the US were found to demonstrate a trend towards lack of acceptance of the application of the death penalty to those under the age of 18.

Related Developments Regarding the Age of Majority

In regard to related developments concerning the age of majority in international law, the IACHR specifically focused upon the minimum age for participation in hostilities and conflict as mandated in the Optional Protocol to the Convention on the Rights of the Child.[20] Expanding upon it's earlier comments in relation to such issues (mentioned above in reference to treaties) the IACHR emphasized the United State's support, by both the President and the U.S. Congress for the minimum age of 18 for participation in armed conflict. Such a standard reflected in the opinion of the IACHR, those required for societal participation, including the right to vote. Correspondingly the IACHR found such developments to be entirely consistent with the finding that a norm prohibiting the juvenile death penalty has emerged. The IACHR emphatically argued that it would be difficult to rationalize or justify why a lesser standard should apply in the implementation of capital punishment. In support of this the IACHR drew upon broadly recognized obligations to provide enhanced protection to children, including endeavours to rehabilitate and care for juvenile offenders.

Conclusion

The IACHR concluded, from the evidence canvassed above, that since the decision in Roach and Pinkerton, the *jus cogens* norm prohibiting the execution of children had further developed in regard to the age of majority (18). The IACHR further acknowledged that 'the acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards.'[21]

PROCEDURE

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[18] *Ibid.*
[19] *Domingues*, paragraph 77
[20] *Domingues*, paragraphs 80, 81, 82
[21] *Domingues*, paragraph 85

It should be noted that the United States failed to respond to the IACHR's communications in regard to the Domingues case, until after the report had been adopted and transmitted to the parties. Consequently, the IACHR also took this opportunity to forcefully address and re-iterate the obligations of member states. Noting the United States failure to respond to communications from the IACHR for 16 months after the initial communication and after the IACHR had adopted its preliminary merits report, the Commission emphasized the obligation of the member state to participate in good faith and a timely manner. The IACHR found the United States delay in responding to be 'plainly inadequate, particularly in a proceeding...concerning the situation of a person under sentence of death.'[22]

This point was reinforced by the IACHR's restatement of the procedural and substantive implications of such a delay, including the lack of obligation on the part of the Commission to consider any submissions made at such a stage.

Acknowledging the significance of the issues raised within the case, the IACHR chose to summaries and provide observations upon the United States' submissions, 'without detracting from the fundamental procedural considerations'[23] noted above.

UNITED STATES' SUBMISSIONS AND IACHR RESPONSE

The U.S. submitted several submissions in response to the preliminary merits reports. The U.S. asserted that it was 'inconsistent' and 'implausible' for the IACHR to find the prohibition against the execution of those under 18 to be a norm of *jus cogens*, particularly considering that just 15 years previously (in *Roach & Pinkerton*) the IACHR did not find evidence of customary international law in this respect.[24] The IACHR, in response, pointed to the decision in Roach and Pinkerton, which concluded that a norm of *jus cogens* prohibiting the execution of children had emerged. Further, the IACHR acknowledges that this was explicitly recognized by the U.S. Therefore the question before the IACHR was whether the norm had since evolved to 'delimit the age of 18 as the defining age of a child.'[25]

The U.S. also contended that neither the state practice nor legal standards identified by the IACHR were sufficient to support a finding of a jus cogens norm; in particular they argued that the IACHR's reliance upon the treaties cited above was 'misplaced.'[26] In support of this the U.S. refers to the negotiating history of the treaties and the 'common knowledge' that many countries may ratify such treaties however fail to implement the corresponding obligations. The IACHR responds by highlighting that despite views that may have been asserted at the time of negation in respect to both the ICCPR and CRC, nearly all states have accepted the provisions unconditionally through ratification and accession. The IACHR further rejected the proposition that a 'historical disconnect' existed between ratification and implementation of provisions by reference to a point the U.S. itself acknowledges: that all but 14 of the 191 state parties to the CRC have enacted state laws that comply with these obligations. Further the IACHR stresses that only four states have continued to execute those under the age of 18.

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[22] *Domingues*, paragraph 91
[23] *Domingues*, paragraph 93
[24] *Domingues*, paragraph 102
[25] *Domingues*, paragraph 104
[26] *Domingues*, paragraph 105

A further ground of objection by the U.S. related to the IACHR's purported ignorance of *opinion juris* as a necessary component to international customary law.[27] The U.S. submitted that the IACHR had failed to 'establish that states have discontinued the process of executing juveniles out of sense of legal obligation' and not for example a sense of morality.[28] The IACHR chose to address the objection in depth. Within such an objection they argued was a failure to consider several factors relating to the nature and development of *jus cogens* and how such norms may be evidenced. Expanding upon this the IACHR states that evidence of *opinio juris* may 'not always be necessary to determine the existence of a *jus cogens* norm.[29] Further the IACHR acknowledges that evidence can be garnered through state practice and treaty provisions Citing genocide as an example, the IACHR, further notes that evidence of *opinio juris* through a sense of legal obligation is not always a 'prerequisite to the existence of a norm of *jus cogens*.'[30] Pointing to the consideration given to the ICCPR and CRC, the IACHR stressed that evidence beyond this may not be essential. Further the IACHR criticizes the U.S position for failing to consider the role treaties and international instruments play in evidencing *opinio juris*.

The final objection by the US was in relation to the IACHR's recognition of other related developments.[31] Arguing that the reliance upon the Optional Protocol to the CRC concerning children in Armed Conflict was misconstrued, the US argues that the provisions contained cannot support the prohibition on the execution of juveniles found by the commission. Further they contend that in any event there is no probative value as it does not address the issue of the juvenile death penalty. In this regard the IACHR re-iterated its view that such developments are motivated by a 'common precept'[32], namely that 18 is the internationally accepted age at which an individual may be assumed to 'make and bear responsibility for their judgments.'[33]

CONCURRING OPINION OF COMMISSIONER HELIO BICUDO.

Commissioner Helio Bicudo, concurred with the findings of the commission, however he also addressed the lawfulness of the death penalty in general, within the Inter-American System. He identified a conflict between various provisions and instruments within the inter-American system. In his opinion, a conflict and inherent contradiction arose from the provisions of Article 1 of the American Declaration (right to life, liberty and security), Article 2 of the American Declaration (equality before the law), Article 4 of the American Convention (the right to life), Article 5 of the American Convention affirming the right to personal integrity and freedom from torture, cruel or inhumane or degrading punishment and treatment and the explicit provision for the death penalty under Article 4, section 2 of the American Convention.

Adopting a systematic approach, Bicudo, analyzed the various provisions in relation to the application of the death penalty. In addressing the issue of torture, Bicudo comments upon the 'immeasurable suffering' such a punishment can bring in regard to the wait for execution and the corresponding oscillation between hope and despair.[34] Noting the provisions within the Inter-

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[27] *Domingues*, paragraph 99
[28] *Ibid.*
[29] *Domingues*, paragraph 107
[30] *Ibid.*
[31] *Domingues*, paragraph 101
[32] *Domingues*, paragraph 110
[33] *Ibid.*
[34] Concurring opinion of Helio Bicudo, paragraph 11

American Convention to Prevent and Punish Torture, the ICCPR, Article 3 of the European Convention on Human Rights (ECHR) and Article 5 (2) of the American Convention, Bicudo looked to other international bodies' interpretation for guidance in reconciling such provisions with the death penalty. Bicudo specifically drew upon the decision of the European Court of Human Rights in *Soering* (determining the death penalty to be a violation on Article 3 of the ECHR); the restrictive nature of treaty provisions allowing for the application of the death penalty and commentary by the Inter-American Court on Human Rights. These developments Bicudo acknowledged as expressing the move towards complete abolition of the death penalty.

Bicudo further concluded that the application of the death penalty violates the rule of law and fundamental concepts of proportionality. The rule of law, Bicudo argues, implies there to be a knowledge of what a penalty imposed means and thus, forbids the imposition of a 'penalty whose consequences cannot be unveiled'.[35] Due to the illusory nature of death, he argues, the death penalty, following this reasoning is prohibited: the offender facing punishment must be able to understand the nature of the punishment and hence how it will affect him. Death is uncertain: an afterlife in purgatory, heaven or simply the physical and metaphysical end.

Continuing from this hypothesis, Bicudo discusses the proportionality of a sentence of death. Stating that 'all punishment...constitutes species of sanctions' imposed in accordance to a rational scale of proportionality, he argues that the concept of proportionality is 'submerged' by death and the scale of proportionality shattered by the qualitative transition in punishment.[36] He draws from the arguments of Reale in arguing that the concepts of life and death cannot be rationally included in a scale of proportionate punishment because they are simply not rational entities. Bicudo thus concludes that "the concept of punishment and the concept of death are logically and ontologically impossible to reconcile".

Turning to issues of equality, Bicudo, noted the prohibition against the execution of women and children contained in the CRC, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (the Convention of Belem do Para) and corresponding provisions in regard to the right to equality before the law.[37] Bicudo argues that Article 3 of the Convention of Belem do Para prohibits the application of the death penalty to women. This he states cannot be positive discrimination but instead discriminates against men and children on the grounds of the female condition. Further the prohibitions upon the execution of children contained in the above provisions in Bicudo's opinion discriminated against others as this right aimed to preserve rights that are not solely created for children but are applicable to mankind. A tension, he argues, is therefore apparent between provisions of equality before the law and those restricting the application of the death penalty.

Adopting a teleological approach to interpretation, Bicudo reconciled the conflicting provisions by concluding that the provision allowing for the imposition of the death penalty (Art. 4 (2) of the American Convention) had been superseded and made redundant by subsequent and contradictory provisions contained within the Inter-American Systems instruments and the evolution of international law, jus cogens and customary law. The American Convention is, as is any international human rights instrument, in Bicudo's opinion a living instrument and thus must be examined in light of such developments. In support of this interpretative approach, Bicudo points to the European Court on Human Rights decision in Tyrer v United Kingdom; the court

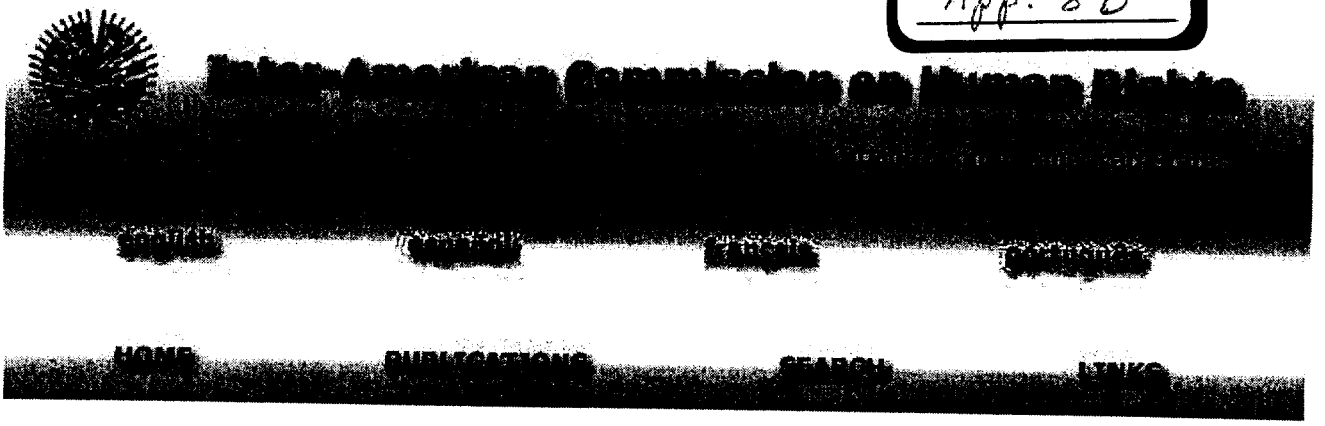
[35] Concurring Opinion of Helio Bicudo, paragraph 33
[36] Concurring Opinion of Helio Bicudo, paragraph 36, 37, 38
[37] Concurring Opinion of Helio Bicudo, paragraph 15, 16

specifically affirmed that the European Convention on Human Rights was a 'living instrument which ... must be interpreted in the light of present day conditions.'[38] Bicudo further cites comments to the same effect by Judge Cancado Trindade of the Inter American Court on Human Rights.

In accordance with this approach Bicudo acknowledges the significance of the widespread accession and ratification of the CRC as being irrefutable proof that the prohibition against the death penalty was a consolidated principle of international law. Citing the jurist Faundez Ledesma argued that the "rights consecrated in the Convention are minimum rights; it cannot restrict their exercise in a larger measure than the one permitted by other international instruments."[39] The accession to the CRC is considered to be of 'utmost importance, and its co-existence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual." Bicudo, taking into account this and the arguments expounded upon above concluded that provisions such as Article 4(2) have been superseded to the effect that international law concurs an absolute prohibition on the death penalty.

[38] Concurring Opinion of Helio Bicudo, paragraph 62, quoting *Tyrer vs. UK*
[39] Concurring Opinion of Helio Bicudo, paragraph 41, quoting Hector Faundez Ledesma

DEFENDANT'S EXHIBIT
App. 8B



REPORT Nº 62/02*
MERITS
CASE 12.285
MICHAEL DOMINGUES
UNITED STATES
October 22, 2002

I. SUMMARY

1. On May 1, 2000 the Inter-American Commission on Human Rights (the "Commission") received a petition from Mr. William A. Courson of the Magnus Hirschfield Center for Human Rights against the United States of America (the "State," the "United States," or the "U.S."). The Petition was presented on behalf of Mr. Michael Domingues, who is incarcerated on death row in the State of Nevada. On December 8, 2000 the petition was supplemented by a second petition filed on behalf of Mr. Domingues by Mr. Mark Blaskey, Clark County Public Defender. It was subsequently agreed by Mr. Domingues, Mr. Courson and Mr. Blaskey that Mr. Blaskey would act as Mr. Domingues' sole representative in proceedings before the Commission (the "Petitioner").

2. The Petitioner states that Mr. Domingues had been convicted and sentenced to death in respect of two homicides that occurred in the state of Nevada in 1993. Mr. Domingues was 16 years old when the crimes were committed. The Petitioner further states that on November 1, 1999 the Supreme Court of the United States declined to review a ruling by the Supreme Court of the State of Nevada permitting the execution of a person convicted of a crime committed while a juvenile. As of the date of this report, no date for Mr. Domingues' execution had been scheduled.

3. The Petitioner alleges that Mr. Domingues has exhausted his domestic remedies and therefore that his petition is admissible. He also alleges that by sentencing Mr. Domingues to death for crimes committed while he was a juvenile, the State is in breach of Articles I (right to life), II (right to equality before law), VII (right to protection for mothers and children) and XXVI (right to due process of law) of the American Declaration of the Rights and Duties of Man ("the American Declaration"). More particularly, the Petitioner argues that the United States is in violation of Article I of the American Declaration because of an international *jus cogens* norm prohibiting the execution of juvenile offenders. The Petitioner also claims that the failure of the United States to preempt the pattern of legislative arbitrariness within the individual states of the U.S. in respect of the application of the death penalty to juvenile offenders has resulted in the arbitrary deprivation of life and inequality before the law. He states that on this basis, the U.S. is in violation of Articles I and II of the Declaration. Finally, the Petitioner complains that the application of the death sentence to Mr. Domingues would represent a breach of Article VII and XXVI of the Declaration.

4. As of the date of the adoption of the Commission's preliminary report, the Commission had not received any information or observations from the State regarding Mr. Domingues' petition.

5. In the present report, having examined the information and arguments provided by the parties, the Commission decided to admit the case in relation to Articles I, II, VII, and XXVI of the Declaration. In addition, after considering the merits of the case, the Commission concluded that the State has acted contrary to an international norm of *jus cogens* by sentencing Michael Domingues to the death penalty for a crime that he committed when he was 16 years of age. Consequently, should the State execute Mr. Domingues pursuant to this sentence, the Commission found that it will be responsible for a grave and irreparable violation of Mr. Domingues' right to life under Article I of the American Declaration.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Observations of the Parties

6. On May 30, 2000 the Commission decided to open Case Nº 12.285 in relation to Mr. Domingues' complaint, and by note of the same date transmitted the pertinent parts of the petition submitted by Mr. Courson to the State, with a request that the State deliver information that it considered pertinent to the complaint within 90 days as prescribed by the Commission's Regulations. Also by note of the same date, the Commission informed Mr. Courson that Mr. Domingues' petition had been transmitted to the State.

7. On December 8, 2000 the Commission received a further petition filed on behalf of Mr. Domingues from Mr. Mark S. Blaskey, Clark County Public Defender. On January 11, 2001 the Commission received written confirmation from Mr. Domingues that he is represented by Mr. Blaskey and that the petition of December 8, 2000 had been filed with Mr. Domingues' full knowledge, authorization and consent. Mr. Domingues further indicated that he had not spoken to any other attorney or organization about filing a petition on his behalf and should any conflict exist between petitions, he would wish the Commission to proceed with the petition filed by Mr. Blaskey.

8. By note dated January 25, 2001 the Commission informed Mr. Courson that the Commission had received a second petition on behalf of Mr. Domingues, together with a written statement from Mr. Domingues as outlined above. Following further communications between the Commission, Mr. Courson and Mr. Blaskey, on February 21, 2001 the Commission received a letter from Mr. Blaskey stating that he would act as sole representative for Mr. Domingues before the Commission and that Mr. Courson agreed with this arrangement. Enclosed with this letter was a communication from Mr. Courson confirming this agreement.

9. Accordingly, the Commission transmitted the pertinent parts of the supplementary petition filed by Mr. Blaskey to the State in a communication dated March 5, 2001, with a request that the State provide all the information relevant to the case within 30 days. As of the date of the Commission's preliminary report, the Commission had not received any observations from the State on Mr. Domingues' complaint.

B. Precautionary Measures

10. In its May 30, 2000 communication to the State, the Commission requested precautionary measures from the United States pursuant to Article 29(2) of the Commission's prior Regulations.[1] This request was made on the basis that if the State was to execute Mr. Domingues before the Commission had an opportunity to examine the allegations in his petition, his complaint would be rendered moot in terms of the availability of potential

remedies and irreparable harm would be caused to Mr. Domingues. The Commission did not receive a response from the State to its request for precautionary measures.

C. Friendly Settlement

11. By communications dated August 22, 2001 to the Petitioner and to the State, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter pursuant to Article 41 of the Commission's Rules of Procedure on the basis of respect for the human rights recognized in the American Convention, the American Declaration and other applicable instruments. The Commission also requested that the parties provide the Commission with a response to the Commission's offer within 10 days, in default of which the Commission would continue with consideration of the matter.

12. In a communication dated August 29, 2001 and received by the Commission on September 4, 2001 the Petitioner informed the Commission that on Mr. Domingues' behalf he accepted the Commission's offer to facilitate a friendly settlement of the matter. By note dated September 6, 2001 the Commission transmitted the pertinent parts of the Petitioner's communication to the State and requested its observations within 10 days, in default of which the Commission would consider that a friendly settlement was not possible and continue with its consideration of the matter.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

1. Admissibility

13. The Petitioner contends that Mr. Domingues' complaints are admissible in accordance with the requirements of the Commission's Rules of Procedure. He states that Mr. Domingues filed a motion in the State trial court to correct an illegal sentence by arguing that Nevada State law is superseded by international law that prohibits the execution of juveniles, including the International Covenant on Civil and Political Rights (ICCPR), customary international law and *jus cogens*. The trial court denied the motion. In addition, Mr. Domingues has twice appealed his conviction and death sentence to the Nevada Supreme Court. On his second appeal, a majority of the Nevada Supreme Court concluded that a "reservation" to the ICCPR made by the U.S. Senate permitted Mr. Domingues' execution. Neither the Nevada Supreme Court nor the trial court discussed the issue of whether the reservation was valid, or whether the execution of juvenile offenders violated customary law of *jus cogens*. A writ of certiorari was filed to the U.S. Supreme Court alleging violations of the ICCPR, customary international law and *jus cogens*. On November 1, 1999 the U.S. Supreme Court denied the writ without discussion.

14. The Petitioner also claims that the legislative and executive branches of the United States government have likewise denied Mr. Domingues an effective remedy. He alleges in this respect that when the State ratified the ICCPR on June 8, 1992 the U.S. Senate placed a reservation on Article 6(5) which prohibits the imposition of capital punishment on children who are under 18 years of age when they commit their crime, thereby depriving Mr. Domingues of the protection of this provision of the treaty. The Petitioner also claims that in Mr. Domingues' certiorari proceeding before the U.S. Supreme Court, the Office of the Solicitor General, on behalf of the Executive Branch, did not argue that there was not a *jus cogens* norm prohibiting the execution of 16 year old offenders, but urged the U.S. Supreme Court not to hear the case in part on the basis that the United States had asserted a "persistent objection to the asserted legal obligation up to this point in international fora."[2]

15. Consequently, the Petitioner argues that Mr. Domingues has been denied his right to a substantive appeal on these issues and has exhausted domestic remedies in accordance with Article 31 of the Commission's Rules of Procedure.

16. The Commission received the first petition on behalf of Mr. Domingues on May 1, 2000 within 6 months of the date of the final domestic judgment in the case. Consequently, it is contended that Mr. Domingues has complied with Article 32 of the Commission's Rules of Procedure.

2. Merits

17. With respect to the merits of the case, the Petitioner indicates that Mr. Domingues is a U.S. citizen who in August 1994 was tried and convicted by a jury in Nevada of one count of burglary, one count of robbery with the use of a deadly weapon, one count of first degree murder and one count of first degree murder with the use of a deadly weapon. Mr. Domingues was sentenced to death for each of the two murder convictions. The Petitioner argues that the imposition of the death penalty upon an offender who was aged sixteen years at the time of his crime is a breach of Articles I, II, VII and XXVI of the American Declaration for which the State must be held responsible.

18. With respect to Article I of the Declaration, the Petitioner argues that an international *jus cogens* norm exists which prohibits the death penalty for juvenile offenders below the age of 18 years. In presenting this argument, the Petitioners first emphasize that in the case of Roach and Pinkerton v. United States, which was the subject of a decision by this Commission in 1987, the United States recognized that a *jus cogens* norm prohibiting the execution of juvenile existed, but that insufficient international consensus existed as to the age of majority, a position with which the Commission ultimately concurred.[3]

19. In support of their contention that a norm of *jus cogens* has developed since the Commission's decision in Roach and Pinkerton prohibiting the execution of offenders who were under age 18 when their committed their crimes, the Petitioner cites numerous authorities, including international and regional treaties, United Nations resolutions and the domestic practice of states. The Petitioner relies in particular upon Article 6(5) of the International Covenant on Civil and Political Rights, which the United States ratified in 1992 but subject to a reservation by which the State purported to preserve the right to impose the death penalty on offenders under age 18.[4] The Petitioner also refers to the U.N. Convention on the Rights of the Child, Article 37(1) of which prohibits the imposition of capital punishment for offenses committed below 18 years of age. The Petitioner notes in particular that as of November 30, 1997 191 countries had ratified or acceded to the Convention with only two countries, the United States and Somalia, having failed to become parties to the instrument. Additional treaties relied upon by the Petitioner in support of his argument include the American Convention on Human Rights, which the United States signed on June 1, 1977 and Article 4(5) of which prohibits the imposition of capital punishment upon persons who, at the time the crime was committed, were under 18 years of age, as well as the Fourth Geneva Convention of 1949, Article 68 of which provides that "the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offense." The Petitioner notes in this respect that the United States ratified this treaty without opposition to the prohibition of juvenile executions.[5]

20. Among the other authorities cited by the Petitioner are resolutions adopted by the U.N. Sub-Commission on the Promotion and Protection of Human Rights and the United Nations Commission on Human Rights in, respectively, 1999 and 1997 condemning the imposition of the death penalty on those who were under the age of 18 at the time the offense was committed.[6] Further, the Petitioner relies upon evidence of the domestic practice of

states which he claims indicate, *inter alia*, that since 1990 only seven countries in the world are known to have executed children who were under the age of 18 at the time of their offense,[7] and that even states within the United States, including Florida and Montana, have recently followed the *jus cogens* prohibition by prohibiting the execution of 16 year old offenders.[8]

21. In addition and in the alternative, the Petitioner argues that the United States Government has failed to ensure that a uniform approach is taken towards the execution of juvenile offenders, thereby allowing a pattern of legislative arbitrariness to continue throughout the individual states. The Petitioner alleges that this failure results in the arbitrary deprivation of life and inequality before the law in breach of both Article I and Article II of the Declaration, as well as a violation of the right to special protection of children under Article VII of the Declaration. According to the Petitioner, by allowing the application of the death penalty upon a 16 year old offender to be determined by the location in which the crime was committed, U.S. policy results in the arbitrary deprivation of life and inequality before the law. In making this assertion, the Petitioner relies upon this Commission's decision in the Roach and Pinkerton case in which the Commission ruled that the United States' failure to preempt states on the issue of the juvenile death penalty resulted in the arbitrary deprivation of life and inequality before the law contrary to Articles I and II of the American Declaration. [9]

22. The Petitioner also cites statistics indicating that as of the date of the petition, 8 U.S. states have specific statutes that authorize the death penalty for 16 year old offenders, 15 states and the federal government set the minimum age at 18, 9 states have no age limit specified in their statutes, and 13 states prohibit the death penalty altogether.[10] On this basis, the Petitioner argues that the United States has done nothing to bring uniformity to the state practice of executing juveniles, and moreover, that the United States has "directly undermined" the obligation it owes to the citizens of the United States under the American Declaration by ratifying the ICCPR with an invalid reservation to the prohibition of juvenile death penalties.[11]

23. Finally, the Petitioner argues that the imposition of the death penalty upon Mr. Domingues represents a breach of its obligations under the U.N. Convention on the Rights of the Child and the American Declaration. The Petitioner acknowledges that the U.S. has not ratified the Children's Convention treaty but points out that 191 countries worldwide have ratified or acceded to the treaty and that the U.S. and Somalia are the only two countries in the world that have not.

24. The Petitioner also relies in this respect upon the obligations assumed by the U.S. under Article 18 of the Vienna Convention of the Law of Treaties by virtue of the fact that it has signed the Convention in February 1995. Article 18 provides that

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty, or
>
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.[12]

25. Therefore, by executing Mr. Domingues, the Petitioner claims that the United

States would violate the object and purpose of the Convention on the Rights of the Child and would therefore be in breach of its international legal obligations.

B. Position of the State

26. As of the date of adoption of the Commission's preliminary report, the Commission had not received any observations or information from the State regarding Mr. Domingues' complaint.

IV. ANALYSIS

27. Before undertaking its analysis of the present case, the Commission wishes to clarify that in light of the exceptional circumstances of this matter as a death penalty case and the fact that the parties have had numerous opportunities to present observations on the admissibility and merits of the Petitioners' claims, and consistent with its past practice in petitions of this nature,[13] the Commission decided to consider the admissibility of the Petitioners' claims together with the merits.

28. Also in this connection, and in the absence of any observations from the State on the admissibility or merits of Mr. Domingues' case, the Commission wishes to underscore the significance of OAS member states' obligations to respond to the Commission's communications, including those pertaining to petitions that complain of human rights violations attributable to a member state. This obligation flows generally from member states' human rights responsibilities as parties to the OAS Charter and other pertinent instruments, and specifically from the terms of Articles 19 and 20 of the Commission's Statute and Articles 30 and 38 of the Commission's Rules of Procedure.

29. Among the consequences that follow from a State's silence on the merits of a petition is the Commission's entitlement, as prescribed in Article 39 of its Rules of Procedure, to presume the facts alleged in the petition to be true as long as other evidence does not lead to a different conclusion. It is with this regulation in mind that the Commission will evaluate the Petitioner's allegations in the present case.

A. Commission's Competence

30. The Petitioner claims that the State has violated Mr. Domingues' rights under Article I (the Right to Life), Article II (the Right to equality before the law), Article VII (the Right to Protection for Children), and Article XXVI (the Right not to receive cruel and unusual punishment), under the American Declaration of the Rights and Duties of Man. The State is a member of the Organization of American States that is not a party to the American Convention on Human Rights as provided for in Article 20 of the Commission's Statute and deposited its instrument of ratification of the OAS Charter on June 19, 1951.[14] The events raised in the Petitioner's claim occurred subsequent to the State's ratification of the OAS Charter. The alleged victim is a natural person, and the Petitioner was authorized under Article 23 of the Commission's Rules of Procedure to lodge the petition on behalf of Mr. Domingues. The Commission is therefore competent to examine this petition.

B. Admissibility

31. With respect to the admissibility of Mr. Domingues' complaints, the information presented by the Petitioner indicates that Mr. Domingues has filed a motion in the State trial court to correct an "illegal sentence". The Court denied that motion and Mr. Domingues appealed to the Nevada Supreme Court, the highest court in the state. In reviewing the case, the Nevada Supreme Court examined only the single issue of whether

Nevada law is superseded by an international treaty ratified by the United States that prohibits the execution of individuals who committed capital offenses while under the age of eighteen. The Court concluded that a reservation to the ICCPR made by the U.S. Senate purporting to reserve the right to execute juvenile offenders despite the non-derogation provisions of the ICCPR permitted the execution of Mr. Domingues. The Nevada Supreme Court, like the trial court below, did not discuss the issues of whether the reservation was valid or whether the execution of children under eighteen years of age violated customary international law or *jus cogens*. Because both the trial court and the Nevada Supreme Court failed to issue a ruling on the merits, the Petitioner submits that Mr. Domingues has been denied his right to a substantive appeal.

32. Further, according to the record, on March 3, 1999 Mr. Domingues filed a petition for writ of certiorari to the U.S. Supreme Court alleging violations of the ICCPR, customary international law and *jus cogens*. On November 1, 1999 the U.S. Supreme Court denied Mr. Domingues' writ without discussion. The State has not alleged or otherwise established that Mr. Domingues failed to exhaust the domestic remedies available to him in the United States with respect to the issues raised before the Commission.

33. Based upon the information before it, the Commission finds that the claims of violations of Articles I, II, VII and XXVI of the American Declaration contained in the Petitioner's petition of December 20, 1999 are not inadmissible for failure to exhaust domestic remedies in accordance with Article 31(1) of the Commission's Rules of Procedure.[15]

34. In addition, the record in this case indicates that a petition was lodged on Mr. Domingues' behalf on May 1, 2000 and therefore within 6 months of the denial of his writ of certiorari by the U.S. Supreme Court. The State has not contested the timeliness of Mr. Domingues' petition. The Commission therefore does not find the Petitioner's petition to be inadmissible for violation of the 6-month period under Article 32 of the Commission's Rules of Procedure.[16]

35. There is no evidence on the record indicating that the subject matter of Mr. Domingues' complaint is pending in another international proceeding for settlement as provided for under Article 33(1)(a) of the Commission's Rules of Procedure.[17] Further, while the Commission has received two petitions in this case which essentially duplicate the same subject matter, Mr. Domingues has, consistent with the terms of Article 33(2)(b) of the Commission's Rules of Procedure,[18] authorized Mr. Blaskey as the author of the second petition to represent him for the purposes of the proceeding before the Commission, and the Commission has consolidated the complaints on this basis. The State has not objected to the petition on grounds of duplication. The Petitioner's claims are therefore not inadmissible under Article 33(1)(a) of the Commission's Rules of Procedure.

36. Finally, having reviewed the Parties' observations and other material on the record in this matter, and in the light of the heightened level of scrutiny that the Commission has traditionally applied in cases involving the implementation of capital punishment, the Commission considers that the Petitioner's petition is not manifestly groundless and contains facts that, if proven, tend to establish violations of Articles I, II, VII and XXVI of the American Declaration. Consequently, the Commission does not find Mr. Domingues' petition to be inadmissible under Article 34 of the Commission's Rules of Procedure.[19]

37. In accordance with the foregoing analysis of the requirements of the applicable provisions of the Commission's Rules of Procedure, the Commission decides to declare as admissible the claims presented in the Petition before it with respect to Articles I, II, VII, and XXVI of the American Declaration, and to proceed to examine the merits of the complaint.

C. Merits

1. Standard of Review

38. Before addressing the merits of the present case, the Commission wishes to reaffirm and reiterate its well-established doctrine that a heightened level of scrutiny will be applied in deciding cases involving capital punishment. The right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights. The Commission therefore considers that it has an enhanced obligation to ensure that any deprivation of life that an OAS member state proposes to perpetrate through the death penalty complies strictly with the requirements of the applicable inter-American human rights instruments, including the American Declaration. This "heightened scrutiny test" is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty,[20] and has been articulated and applied by the Commission in previous capital cases before it.[21]

39. The Commission further notes that the heightened scrutiny test applicable to death penalty cases is not precluded by the Commission's fourth instance formula. According to this formula, the Commission in principle will not review the judgments issued by domestic courts acting within their competence and with due judicial guarantees.[22] Where a possible violation of an individual's rights under applicable inter-American human rights instruments is involved, however, the Commission has consistently held that the fourth instance formula has no application.[23] The Commission will therefore review the allegations made by the Petitioner with a heightened level of scrutiny, to ensure that Mr. Domingues' rights under the American Declaration have been properly respected by the State.

2. The Commission's Decision in Roach and Pinkerton

40. The Commission notes at the outset of its analysis that the Petitioner's arguments draw significantly upon the Commission's 1987 decision in the case of Roach and Pinkerton against the United States.[24] That case concerned two juvenile offenders, James Terry Roach and Jay Pinkerton, who were sentenced to death in the states of, respectively, South Carolina and Texas, for crimes committed when they were seventeen years of age. Both petitioners were subsequently executed by those states. In determining the complaint brought before it on behalf of the Mr. Roach and Mr. Pinkerton, the Commission considered whether the United States had in sentencing the two prisoners to death and subsequently allowing their executions acted contrary to a recognized norm of *jus cogens* or customary international law. While the Commission determined the existence of a *jus cogens* norm prohibiting the execution of children, it found that uncertainty existed as to the applicable age of majority under international law. The Commission specifically articulated the issue before it as follows:

> in the member States of the OAS, there is recognized a norm of jus cogens which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system including the United States [...] the Commission finds that this case arises, not because of doubt concerning the existence of an international norm as to the prohibition of the execution of children, but because the US disputes the allegation that there exists consensus as regards the age of majority.[25]

41. The Commission ultimately concluded that there did not exist at that time a norm of *jus cogens* or other customary international law prohibiting the execution of persons under 18 years of age:

> The Commission is convinced by the US Government's argument that there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty. Nonetheless, in light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, and modifying their domestic legislation in conformity with these instruments, the norm is emerging. As mentioned, thirteen states and the U.S. capital have abolished the death penalty entirely and nine retentionist states [26] have abolished it for offenders under the age of 18.[27]

42. Accordingly, in determining the present complaint, the Commission must address whether the state of international law concerning the execution of individuals under the age of 18 has evolved since its decision in Roach and Pinkerton.

3. The American Declaration, Customary International Law and Norms of *Jus Cogens*

43. In addressing the claims raised by the Petitioner concerning the present status of rules governing the execution of minors under international law, it is first instructive to provide a brief overview of the categories of rules of international law pertinent to this analysis, namely customary international law and norms of *jus cogens*, as well as the principal means by which the contents of those rules are manifested.

44. In this connection, the Commission recalls that in interpreting and applying the Declaration, its provisions, including Articles I, VII and XXVI, should be considered in the context of the broader international and inter-American human rights systems, in the light of developments in the field of international human rights law since it was first composed.[28] Due regard should in this respect be given to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged[29] as well as developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions.[30]

45. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from various sources of international law,[31] including the provisions of other international and regional human rights instruments[32] and customary international law,[33] including those customary norms considered to form a part of *jus cogens*.[34]

46. With respect to the rules of customary international law in particular, while these rules are of an inherently changeable nature and therefore cannot be the subject of a definitive or exhaustive enumeration, there nevertheless exists a broad consensus in respect of the component elements required to establish a norm of customary international law. These include:

> a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
>
> b) a continuation or repetition of the practice over a considerable period of time;
>
> c) a conception that the practice is required by or consistent with prevailing international law;
>
> d) general acquiescence in the practice by other states.[35]

47. These elements in turn suggest that when considering the establishment of such a customary norm, regard must be had to evidence of state practice.[36] While the value of potential sources of evidence vary depending on the circumstances, state practice is generally interpreted to mean official governmental conduct which would include state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international and regional governmental organizations such as the United Nations and the Organization of American States and their organs, domestic policy statements, press releases and official manuals on legal questions.[37] In summary, state practice generally comprises any acts or statements by a state from which views about customary laws may be inferred.[38]

48. Once established, a norm of international customary law binds all states with the exception of only those states that have persistently rejected the practice prior to its becoming law. While a certain practice does not require universal acceptance to become a norm of customary international law, a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based.[39]

49. Turning to the rules which govern the establishment of rules of *jus cogens*, this Commission has previously defined the concept of *jus cogens* as having been derived from ancient law concepts of a "superior order of legal norms, which the laws of man or nations may not contravene" and as the "rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public morality recognized by them."[40] It has been said that the principal distinguishing feature of these norms is their "relative indelibility," in that they constitute rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.[41] More particularly, as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm. Norms of *jus cogens*, on the other hand, derive their status from fundamental values held by the international community, as violations of such preemptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence.[42] Commonly cited examples of rules of customary law that have attained the status of *jus cogens* norms include genocide, slavery, forced disappearances and torture or other cruel, inhuman or degrading treatment or punishment.[43] It has been suggested that a reliable starting point in identifying those international legal proscriptions that have achieved *jus cogens* status is the list of rights that international human rights treaties render non-derogable.[44]

50. Therefore, while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.[45]

4. International Legal Status of the Execution of Juveniles

51. Article I of the Declaration provides that "[e]very human being has the right to life, liberty and the security of his person."

52. The Commission notes that while Article I of the American Declaration does not explicitly refer to the issue of capital punishment, the Commission has in past decisions declined to interpret Article I of the Declaration as either prohibiting use of the death penalty *per se*, or conversely as exempting capital punishment from the Declaration's standards and protections altogether. Rather, in part by reference to the drafting history of the American

Declaration as well as the terms of Article 4 of the American Convention on Human Rights, the Commission has found that Article I of the Declaration, while not precluding the death penalty altogether, prohibits its application when doing so would result in an arbitrary deprivation of life or would otherwise be rendered cruel, infamous or unusual punishment.[46]

53. As noted above, the Petitioner argues that in the light of developments since 1986, a norm of customary international law now exists which prevents the execution of offenders aged 16 or 17 years old at the time of their crime. The Petitioner submits that this norm has acquired the status of *jus cogens*.[47] Consequently, the Petitioner asks that the Commission's decision in the case of Roach and Pinkerton be reviewed and extended, so as to find that Article I of the Declaration prohibits Mr. Domingues' execution as an offender who committed his crime when he was under 18 years of age.

54. In addressing this issue, the Commission must therefore evaluate whether the provisions of the American Declaration, when interpreted in the context of pertinent developments in customary international law and the norms of *jus cogens*, prohibit the execution of individuals who committed their crime when they were under the age of 18. In so doing, it is appropriate for the Commission to take into account evidence of relevant state practice as disclosed by various sources, including recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of the United Nations and other international governmental organizations, and the domestic legislation and judicial decisions of states.

a. Treaties

55. Since 1987, several notable developments have occurred in relation to treaties that explicitly prohibit the execution of individuals who were under 18 years of age at the time of committing their offense. These developments include the coming into force of new international agreements as well as broadened ratifications of existing treaties.

56. Most significantly, on November 20, 1989 the U.N. General Assembly adopted the United Nations Convention on the Rights of the Child. Article 37(a) of the Convention provides that:

> No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

57. The treaty subsequently entered into force on September 2, 1990, and as of September 2001 the Convention had 191 state parties with no explicit reservations taken to Article 37(a).[48] The United States signed the Convention in February 1995, but has not yet ratified the Convention, joining Somalia as the only two states that are not parties to this treaty. In the Commission's view, the extent of ratification of this instrument alone constitutes compelling evidence of a broad consensus on the part of the international community repudiating the execution of offenders under 18 years of age.

58. The International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly in 1966 and entered into force in 1976. There are presently 64 signatories and 147 Parties to the ICCPR.[49] Since 1986, sixty-four countries have acceded to or ratified the Covenant,[50] including the United States in 1992.[51] Article 6(5) of the ICCPR, like Article 37(a) of the Convention on the Rights of the Child, provides that:

> Sentence of death shall not be imposed for crimes committed by persons below

eighteen years of age and shall not be carried out on pregnant women.

59. Of the states parties to this Convention, only the instruments of ratification of the U.S. and of accession by Thailand are presently accompanied by declarations or reservations in respect of Article 6(5). Thailand provided an interpretive declarations for Article 6(5) that reads as follows:

> With respect to article 6, paragraph 5 of the Covenant, the Thai Penal Code enjoins, or in some cases allows much latitude for, the Court to take into account the offender's youth as a mitigating factor in handing down sentences. Whereas Section 74 of the code does not allow any kind of punishment levied upon any person below fourteen years of age, Section 75 of the same Code provides that whenever any person over fourteen years but not yet over seventeen years of age commits any act provided by the law to be an offence, the Court shall take into account the sense of responsibility and all other things concerning him in order to come to decision as to whether it is appropriate to pass judgment inflicting punishment on him or not. If the court does not deem it appropriate to pass judgment inflicting punishment, it shall proceed according to Section 74 (*viz.* to adopt other correction measures short of punishment) or if the court deems it appropriate to pass judgment inflicting punishment, it shall reduce the scale of punishment provided for such offence by one half. Section 76 of the same Code also states that whenever any person over seventeen years but not yet over twenty years of age, commits any act provided by the law to be an offence, the Court *may*, if it thinks fit, reduce the scale of the punishment provided for such offence by one third or one half. The reduction of the said scale will prevent the Court from passing any sentence of death. As a result, though in theory, sentence of death may be imposed for crimes committed by persons below eighteen years, but not below seventeen years of age, the Court always exercises its discretion under Section 75 to reduce the said scale of punishment, and in practice the death penalty has not been imposed upon any persons below eighteen years of age. Consequently, Thailand considers that in real terms it has already complied with the principles enshrined herein.

60. The effect of Thailand's declaration is therefore to clarify that despite the strict terms of its applicable legislation, in practice it does not execute juvenile offenders and therefore in real terms had already complied with Article 6(5) of the ICCPR.

61. For its part, the United States asserted the following reservation to Article 6 (5) upon becoming a party to the ICCPR:

> That the United States reserves the right, subject to its Constitutional constraints, to Impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

62. It is noteworthy that this reservation provoked condemnation within the international community and prompted eleven European States Parties to file objections declaring the reservation to be invalid, a majority on the basis that it was inconsistent with the aims and purposes of the ICCPR as provided by Article 19(c) of the Vienna Convention on the Law of Treaties.[52] Moreover, in 1995 the U.N. Human Rights Committee declared this reservation to be contrary to the object and purpose of the ICCPR and recommended that the United States withdraw it.[53]

63. Other international and regional human rights treaties that regulate the implementation of the death penalty have likewise witnessed an increase in states parties thereto since 1987. With regard to the inter-American human rights system in particular, Article 4 of the American Convention on Human Rights provides

> Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age.

64. There are presently 24 state parties to the American Convention.[54] Since 1986, the following 5 OAS member states ratified or acceded to the Convention, none of which claimed reservations respecting the prohibition under Article 4(5) of the execution of juveniles: Brazil (1992); Chile (1990); Dominica (1993); Suriname (1987); Trinidad and Tobago (1991, which subsequently denounced the Convention in 1998). The United States signed the American Convention in 1977 but has never ratified the treaty. The Commission considers that this broad hemispheric adherence to the American Convention, including Article 4(5) thereof, constitutes compelling evidence of a regional norm repudiating the application of the death penalty to persons under 18 years of age even amongst those states such as Guatemala, Jamaica and Grenada that, like the United States, have retained the death penalty.

65. These international and regional developments have been accompanied by initiatives in both the inter-American and European systems to prohibit the application of the death penalty altogether. In 1990, for example, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was approved by the OAS General Assembly at its twentieth regular session in Asuncion, Paraguay. Eight States have since signed and ratified the Protocol. Similarly, Protocol Nº 6 to the European Convention on Human Rights concerning the Abolition of the Death Penalty abolishes the death penalty entirely except in times of war. The protocol came into force in March 1985 and presently has been ratified by 39 European States. Three states have signed but not yet ratified the Protocol and Turkey stands alone as the only member state of the Council of Europe which has not signed the protocol.

66. In the Commission's view, these developments in the corpus of international human rights law should also be viewed in light of corresponding provisions in the related field of international humanitarian law.[55] In this respect, the Fourth Geneva Convention of 1949 and related instruments prohibit the imposition of the death penalty upon juveniles in times of armed conflict or occupation.[56] Article 68, paragraph 4 of the Fourth Geneva Convention, which governs the application of penal laws to protected persons in situations of occupation, provides in part that

> [i]n any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence.

67. As of January 1, 1986, there were 162 state parties to the Fourth Geneva Convention, and as of 2001, the number of state parties had risen to 189.[57] This includes the United States, which ratified the Convention on August 2, 1955 absent any reservation to paragraph 4 of Article 68. On this point, the Commission can identify no appropriate justification for applying a more restrictive standard for the application of the death penalty to juveniles in times of occupation than in times of peace, relating as this protection does to the most basic and non-derogable protections for human life and dignity of adolescents that are common to both regimes of international law. As the International Committee of the Red Cross observed in its Commentary on Article 68, paragraph 4 of the Fourth Geneva Convention:

> The clause corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint.[58]

68. The foregoing analysis therefore indicates that since 1987, and consistent with events prior to that date, there has been concordant and widespread development and ratification of treaties by which nearly all of the world states have recognized, without reservation, a norm prohibiting the execution of individuals who were under 18 years of age at the time of committing their offense.

b. United Nations Resolutions and Standards

69. The developments in treaty law discussed above have been accompanied by similar initiatives and practices on the part of United Nations bodies. Prior to the Commission's decision in Roach and Pinkerton, the Third Committee of the United Nations General Assembly in 1980 had already recognized Article 6 of the ICCPR as constituting a "minimum standard" for all U.N. members states and not just those that had ratified the ICCPR.[59] Consistent with this position, on August 24, 1999 the United Nations Sub-committee on the Promotion and Protection of Human Rights passed a resolution condemning the imposition of the death penalty on those who were under 18 at the time of their offence and calling upon countries that continued to execute juveniles to bring an end to the practice.[60] In addition, the 54th Session of the United Nations Commission on Human Rights passed a resolution calling on States that maintained the death penalty to comply with the International Covenant by not imposing the death penalty for crimes committed by persons below eighteen years of age.[61]

70. Standards have also been adopted by the United Nations Economic and Social Council that forbid the execution of children who committed their crimes when they were under eighteen.[62] Those same standards have been endorsed by the General Assembly and the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders.[63] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice likewise prohibits the execution of juvenile offenders.[64]

71. It is therefore apparent that the United Nations bodies responsible for human rights and criminal justice have consistently supported the norm expressed in international human rights agreements prohibiting the execution of offenders under the age of 18.

c. Domestic Practice of States

72. The articulation of an international norm proscribing the execution of juvenile offenders through international practice has been accompanied by the expression of a similar standard in the domestic practice of states. In 1986, 46 countries had abolished the death penalty for traditional crimes, with the exception of certain crimes committed under military law or in time of war. Today, according to available statistics the number has more than doubled, with an additional 49 countries having abolished the death penalty during the intervening fifteen years for all but exceptional crimes. Moreover, a further 20 countries have not carried out any executions for ten years or more. It has been stated that the average annual rate at which countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many.[65] According to statistics compiled by Amnesty International, a leading source of research and information concerning the global application of the death penalty, 109 countries have abolished the death

penalty by law or in practice as of the year 2001.[66]

73. Also according to statistics compiled by Amnesty International, 115 states whose laws maintain the death penalty for some offences either have provisions in their laws which exclude the use of the death penalty against child offenders, or may be presumed to exclude such use by virtue of becoming parties to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or the American Convention on Human Rights without entering a reservation to the relevant articles of these treaties.[67] Since the beginning of 1994 at least 5 countries have changed their laws to eliminate the use of the death penalty against child offenders: Barbados, Pakistan, Yemen, Zimbabwe and China. [68]

74. A small minority of states persist in executing juvenile offenders. Since 1990, 7 countries are known to have executed prisoners who were under 18 years old at the time of the crime - Congo (Democratic Republic), Iran, Nigeria, Pakistan, Saudi Arabia, U.S. and Yemen.[69] A study of the worldwide executions of child offenders cite a total of 25 executions within that 10 year period. 14 of those executions were carried out by the United States of America, 6 were conducted in Iran and the remaining 5 nations carried out one execution each. Both Pakistan and Yemen are now reported to have abolished the death penalty for 16 and 17 year old offenders.[70] In the year 2000, only 3 countries carried out any juvenile executions: the U.S., the Democratic Republic of Congo and Iran. In 1999 juvenile executions took place only in Iran and the U.S. In 1998, the U.S. was alone in its execution of 3 juvenile offenders. Yemen's sole execution took place in 1993, and Saudi Arabia's in 1992, with the consequence that since 1998, only three states, the U.S., Congo and Iran, have executed juvenile offenders sentenced to death.[71]

75. As with adherence to regional treaties in the Western Hemisphere, it is pertinent to note that of the few states that have continued to execute juveniles, none but the United States are counted among the members of the inter-American system. In the Commission's view, this reinforces the existence of a particularly pervasive regional norm repudiating the application of the death penalty to persons under 18 years of age.

76. Domestic practice over the past 15 years therefore evidences a nearly unanimous and unqualified international trend toward prohibiting the execution of offenders under the age of 18 years. This trend crosses political and ideological lines and has nearly isolated the United States as the only country that continues to maintain the legality of the execution of 16 and 17 year old offenders, and then, as the following discussion indicates, only in certain state jurisdictions.

d. Practice of the United States

77. Within the United States, judicial determinations and legislative initiatives over the past 20 years have also demonstrated a trend towards lack of acceptance of the application of the death penalty to those offenders under the age of 18 years. At the time of the decision of the U.S. Supreme Court in the case *Thompson v. Oklahoma* in 1988, 36 states authorized the use of capital punishment and of those, 18 required that the defendant attain at least the age of 16 years at the time of his or her offense, while another 19 provided no minimum age for the imposition of the death penalty.[72] In the Thompson decision, the U.S. Supreme Court held that the execution of offenders under the age of sixteen years at the time of their crimes was prohibited by the Eighth Amendment to the United States Constitution. [73] In its analysis of that case, the Supreme Court concluded that it would "offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense," and cited in support of its conclusion the fact that

> [r]elevant state statutes - particularly those of the 18 States that have expressly considered the question of a minimum age for imposition of the death penalty, and have uniformly required that the defendant have attained at least the age of 16 at the time of the capital offense - support the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense. That conclusion is also consistent with the views expressed by respected professional organizations, by other nations that share the Anglo-American heritage, and by the leading members of the Western European Community.[74]

78. Moreover, since this initiative by the U.S. Supreme Court to establish a minimum age of 16 at which an offender may be executed in the United States, additional state jurisdictions have moved toward a higher standard. In 1999, for example, the Florida Supreme Court interpreted the Florida Constitution to prohibit the death penalty for sixteen-year-old offenders, ruling that the execution of a person who was 16 years old at the time of his crime violated the Florida Constitution and its prohibition against cruel and unusual punishment.[75] On April 30, 1999 a revision of Montana state law raised the minimum age of offenders who are eligible for the death penalty from 16 year to 18 years of age.

79. Currently within the United States, 38 states and the federal military and civilian jurisdictions have statutes authorizing the death penalty for capital crimes. Of those jurisdictions, 16 have expressly chosen the age of 18 at the time of the crime as the minimum age for eligibility the death sentence,[76] compared to approximately 10 in 1986,[77] and 23 states allow the execution of those under 18, compared to 27 in 1986.[78] These statistics complement the international movement toward the establishment of 18 as the minimum age for the imposition of capital punishment. The Commission considers it significant in this respect that the U.S. federal government itself has considered 18 year to be the minimum age for the purposes of federal capital crimes.[79] As the U.S. government is the authority responsible for upholding that State's obligations under the American Declaration and other international instruments, the Commission considers the federal government's adoption of 18 as the minimum age for the application of the federal death penalty as a significant indication by the United States itself of the appropriate standard on this issue.

e. Related Developments Regarding the Age of Majority

80. The Commission notes that the emergence of 18 as the minimum age for the execution of offenders is consistent with developments in other fields of international law addressing the age of majority for the imposition of serious and potentially fatal obligations and responsibilities. The Commission notes in particular the establishment of 18 as the minimum age for individuals to take direct part in hostilities as members of their state's armed forces. In this respect, the Optional Protocol to the Convention on the Rights of the Child respecting the involvement of children in armed conflicts, which was adopted and opened for signature, ratification and accession on May 25, 2000,[80] provides in Article I that the age of 18 years represents a threshold below which special protection is required:

> Article 1
>
> State parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

81. The United States signed the Optional Protocol on September 7, 2000, and while it has not yet ratified the Protocol or the underlying Convention, both the President of the United States[81] and the U.S. Congress expressed support for the rule prescribed in

Article I, with Congress encouraging the United States delegation "not to block the drafting of an optional protocol to the Convention on the Rights of the Child that would establish 18 as the minimum age for participation in armed conflict."[82]

82. Support for this standard has also been expressed by the OAS General Assembly, which by resolution dated June 5, 2000 noted that more than 300,000 children under 18 years of age were at that time participating in armed conflicts worldwide. In light of this statistic, the General Assembly called upon member states to consider signing and ratifying the Optional Protocol to the United Nations Convention on the Rights of the Child regarding the participation of children in armed conflicts.[83] Similar standards have been recognized internationally and within the United States itself in connection with areas of societal participation, such as the right to vote, in which the attainment of the age of 18 is considered a minimum and necessary prerequisite.[84]

83. Accordingly, a finding that an international norm has emerged establishing 18 as the minimum age at which an individual is liable to face the ultimate punishment of death is, in the Commission's view, entirely consistent with corresponding developments relating to obligations of an equivalent or lesser nature, such as participating in armed conflict or electing political leaders. Indeed, it is difficult to rationalize, much less justify, why a lesser standard should apply in the implementation of capital punishment. This is particularly evident given the broadly-recognized international obligation of states to provide enhanced protection to children, which includes ensuring the well-being of juvenile offenders and endeavor their rehabilitation. These obligations are reflected in Article 19 of the American Convention[85] and Article VII of the American Declaration[86] and, as interpreted by the Inter-American Court of Human Rights, require that "when the State apparatus has to intervene in offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to 'allow them to play a constructive and productive role in society.'"[87]

f. Conclusion

84. In the Commission's view, the evidence canvassed above clearly illustrates that by persisting in the practice of executing offenders under age 18, the U.S. stands alone amongst the traditional developed world nations and those of the inter-American system, and has also become increasingly isolated within the entire global community. The overwhelming evidence of global state practice as set out above displays a consistency and generality amongst world states indicating that the world community considers the execution of offenders aged below 18 years at the time of their offence to be inconsistent with prevailing standards of decency. The Commission is therefore of the view that a norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime.

85. Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its Roach and Pinkerton decision. As noted above, nearly every nation state has rejected the imposition of capital punishment to individuals under the age of 18. They have done so through ratification of the ICCPR, U.N. Convention on the Rights of the Child, and the American Convention on Human Rights, treaties in which this proscription is recognized as non-derogable, as well as through corresponding amendments to their domestic laws. The acceptance of this norm crosses political and ideological boundaries and efforts to detract from this standard have been vigorously condemned by members of the international community as impermissible under contemporary human rights standards. Indeed, it may be said that the United States itself, rather than persistently objecting to the standard, has in several significant respects recognized the propriety of this norm by, for example, prescribing the age of 18 as the federal

standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation to this standard. On this basis, the Commission considers that the United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age. As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.

86. Interpreting the terms of the American Declaration in light of this norm of *jus cogens*, the Commission therefore concludes in the present case that the United States has failed to respect the life, liberty and security of the person of Michael Domingues by sentencing him to death for crimes that he committed when he was 16 years of age, contrary to Article I of the American Declaration.

87. As a further consequence of this determination, the Commission finds that the United States will be responsible for a further grave and irreparable violation of Mr. Domingues' right to life under Article I of the American Declaration if he is executed for crimes that he committed when he was 16 years of age.

V. PROCEEDINGS SUBSEQUENT TO REPORT 116/01

88. On October 15, 2001 the Commission adopted Report 116/01 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record, findings and recommendations in this matter.

89. Report 116/01 was transmitted to the State on October 19, 2001 with a request that the State provide information as to the measures it had taken to comply with the recommendations set forth in the report within a period of two months, in accordance with Article 43(2) of the Commission's Rules. Contemporaneously, in a communication dated October 18, 2001 and received by the Commission on October 19, 2001, the United States delivered to the Commission its response to the petition.

90. By communication dated December 17, 2001 and received by the Commission on December 19, 2001 the State delivered a response to the Commission's October 19, 2001 request for information. In its reply, the State relied upon and reiterated the arguments contained in its October 18, 2001 observations, and also provided additional submissions in respect of the Commission's preliminary merits report in which it did not accept the Commission's conclusions and recommendations and requested that the Commission "withdraw" its report. This response was followed by a communication dated June 25, 2002 and received by the Commission on June 27, 2002 in which the State provided "supplemental observations" to the Commission's report.

91. Prior to addressing the State's response in further detail, the Commission wishes to make the following observations concerning several procedural aspects of the matter before it. The Commission first emphasizes the obligation of member states to participate in the Commission's contentious procedures in good faith and in a timely manner, in compliance with the Commission's authority under Article 20(b) of its Statute to, *inter alia*, examine communications submitted to it and any other available information and to address the government of any member state not a Party to the Convention for information deemed pertinent by the Commission. In the present case, despite having been provided with communications respecting Mr. Domingues' complaint in May 2000, January 2001, August 2001 and September 2001, the State did not respond to the Commission's communications until October 19, 2001 16 months after the Commission's initial notification and after the Commission adopted its preliminary merits report. Such a delay in providing any response to

the Commission is, in its view, plainly inadequate, particularly in a proceeding of this nature concerning the situation of a person under sentence of death.

92. One of the consequences of a State's prolonged delay in providing information on a complaint is the possibility that the Commission may decide upon the matter absent representations from the State, which, as matters transpired, occurred in the present case. In this connection, the Commission wishes to emphasize that once a preliminary merits report is adopted and transmitted to the state concerned in accordance with Article 43(2) of the Commission's Rules of Procedure, all that remains is for the state to indicate what measures have been adopted to comply with the Commission's recommendations.[88] At this stage of the process, the parties have had a full opportunity to submit their observations, the admissibility and merits phases of the process are completed, and the Commission has rendered its decision. Therefore, while a state may provide its views on the factual and legal conclusions reached by the Commission in its preliminary report, it is not for a state at this point to reiterate its previous arguments, or to raise new arguments, concerning the admissibility or merits of the complaint before the Commission, nor is the Commission obliged to consider any such submissions prior to adopting its final report on the matter.

93. The Commission is also cognizant, however, of the significance of the legal issues raised in this case, for the victim concerned and for inter-American human rights jurisprudence more generally. Therefore, without detracting from the fundamental procedural considerations noted above, the Commission has decided to summarize the State's response and to provide observations on certain aspects thereof. In this regard, the United States has objected to the Commission's findings on several grounds. In summary, the State argued that the petition was inadmissible on the basis of duplication. In addition and in the alternative, the State contended that the evidence considered by the Commission did not support its conclusion that there exists a customary or *jus cogens* prohibition on the execution of juvenile offenders.

94. More specifically, the United States argued that the petition fails to satisfy the criteria for admissibility under Article 33(b) of the Commission's Rules of Procedure[89] because its "subject matter essentially duplicates a petition pending or already examined and settled by the Commission." The State pointed out in this regard that in its findings in the 1987 Case of Jay Pinkerton and James Terry Roach,[90] the Commission previously examined the precise question presented in the present petition and found that while there was a *jus cogens* norm prohibiting the execution of children, there did not exist a norm of customary international law establishing 18 to be the minimum age for the imposition of the death penalty. Accordingly, the State submitted that the petition should be dismissed under Article 33 of the Commission's Rules.

95. The United States also contended that neither the state practice identified by, nor the legal standards cited in the Commission's report, are sufficient to establish either a customary or *jus cogens* prohibition of the execution of juvenile offenders. In support of its position, the State asserted that the Commission's reliance upon the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child as evidence of State practice is misplaced, because the negotiating histories of each of the conventions indicates that the inclusion of the provision concerning the juvenile death penalty was not based upon custom nor even by consensus.[91] The State also suggested that these treaties are not informative of the interpretation and application of the American Declaration because they are subsequent to the Declaration and are only binding on the states parties to them.[92] In any event, the State contended that it is "common knowledge" that many States ratify treaties but fail to implement the obligations that they have assumed under those instruments.[93] This, according to the State, provides an additional reason why reference to treaty provisions prohibiting the use of the death penalty is not sufficient to establish state practice sufficient for customary international law.

96. Further, the United States suggested that UN organs have through their negotiating processes recognized that there is no customary international law prohibition on the execution of juvenile offenders. The State noted in particular that the 1998 UN Commission on Human Rights Resolution cited in the Commission's report was adopted by a vote of 26 to 3 with 12 abstentions and with 51 states, including non-Commission members, signing a statement "disassociating" themselves from that decision. The State also referred to a similar text adopted in 2001 by a vote of 27 to 18 with 7 abstentions and 61 states disassociating themselves from the resolution. In addition, the State referred to a decision of the UN Human Rights Commission during its 2001 session adopting two resolutions by consensus which called upon all states in which the death penalty has not been abolished to "comply with their obligations as assumed under relevant provisions of international human rights instruments, including in particular articles 37 and 40 of the Convention on the Rights of the Child and articles 6 and 14 of the International Covenant on Civil and Political Rights."[94] According to the State, these resolutions were adopted rather than a draft decision proposed by the UN Subcommission on the Promotion and Protection of Human Rights that would have "confirm [ed]" that international law "clearly establishes that imposition of the death penalty on persons aged under 18 at the time of the offense is in contravention of customary international law."[95]

97. In its communication of June 25, 2002 the State supplemented its observations in this regard by reference to the UN General Assembly's May 10, 2002 outcome document following its Special Session on Children, in which the General Assembly "called upon governments that had not abolished the death penalty" to comply with the obligations they have assumed under relevant provisions of international human rights instruments."[96] In the State's view, by not invoking any customary norms in making an appeal for state compliance and only referring to the conventional international law commitments under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights, the General Assembly implicitly rejected the notion that there is also a customary international law against capital punishment for juvenile offenders.

99. The State argued further that, in focussing on the domestic practice of states, the Commission's report ignored *opinio juris* as a necessary element of customary international law. The State complained that the report fails to establish that states have discontinued the process of executing juvenile offenders out of a sense of legal obligation rather than, for example, out of courtesy, fairness or morality.[97]

99. Exception was also taken by the State to the Commission's suggestion that United States practice demonstrates a trend toward the lack of acceptance of the application of the death penalty to those under 18 years of age. The State contended that the Commission's reliance on the 1988 U.S. Supreme Court decision in *Thompson v. Oklahoma* fails to acknowledge that the same Court subsequently found in the 1989 case of *Stanford v. Kentucky* that the imposition of capital punishment on an individual for a crime committed at the age of 16 or 17 did not violate evolving standards of decency and therefore did not constitute cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. The United States also asserted that the legislative and judicial decisions in Florida and Montana referred to by the Commission in its report were not based upon a rule of customary law prohibiting the death penalty with respect to offenders under 18 years of age. Moreover, the State disputed any relevance that the Commission placed on the different minimum age limits for the death penalty in different states, or on the fact that the U.S. federal government itself has considered 18 to be the minimum age for the purpose of federal capital crimes, for the reason that U.S. domestic courts have discounted the pertinence of these factors in determining the permissibility of the execution of juvenile offenders under U.S. law.[98] The State also noted that certain federal law, namely the U.S. Uniform Code of Military Justice, "permits the use of capital punishment for crimes committed by members of the military under the age of 18 for the crimes specified therein."

100. The final evidentiary issue disputed by the State is the Commission's reliance on the Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict. The State argued in this regard that the Commission has misconstrued the Protocol because the binding declaration that states parties are obligated to deposit upon ratification requires them to affirm their agreement to raise the minimum age for voluntary recruitment into their national armed forces from the current international standards of 15 years and hence expressly authorizes the voluntary recruitment of individuals aged 16 or 17. The State also indicated that the Article 1 of the Protocol requires states parties to take "all feasible measures" to ensure that members of their armed forces under the age of 18 do not take a "direct part in hostilities." This, according to the State, recognizes that in exceptional circumstances it will not be feasible for a commander to withhold or remove a soldier under the age of 18 from taking a direct part in hostilities. The State therefore contends that the Optional Protocol does not prohibit in its entirety the involvement of juveniles in armed conflict and therefore cannot be considered a related international legal development that supports an absolute prohibition on the execution of juvenile offenders.[99] In any event, the State argued that the Optional Protocol addresses the use of children in armed conflict and not the execution of persons under 18 years of age and therefore has no probative value in attempts to establish a norm of international law prohibiting the execution of juvenile offenders.

101. As its final ground of objection, the United States argued that it is not bound by any international norm prohibiting the execution of juvenile offenders. Specifically, the United States contends that it has consistently asserted its right to execute juvenile offenders, by making reservations to treaties, filing briefs before national and international tribunals, and making public statements,[100] and correspondingly that even if a norm of customary international law establishing 18 to be the minimum age for the imposition of the death penalty had evolved since the Commission's decision in the Roach and Pinkerton Case, the United States is not bound to such a rule. The State also asserted that because the Commission did not find evidence of customary international law that would prohibit the imposition of the death penalty for juvenile offenders in the Roach and Pinkerton Decision 15 years ago, to find now that there exists a *jus cogens* norm is both inconsistent and implausible. The State claimed in this regard that the only argument presented in favor of this finding in the Commission's report is the assertion that the execution of Mr. Domingues would "shock the conscience of humankind." The State considered this assertion to be "specious at best," and argued to the contrary that the "acts of Mr. Domingues should shock the consciousness of humankind, not the punishment those acts have earned him." [101]

102. Several points in the State's response warrant comment by the Commission. As to the State's objection to the admissibility of the petition on the ground of duplication, the Commission has previously considered that a prohibited instance of duplication under Article 47(d) of the American Convention, which essentially replicates the criteria under Article 33(1)(b) of the Commission's Rules of Procedure, involves, in principle, the same person, the same legal claims and guarantees, and the same facts adduced in support thereof. [102] Accordingly, claims brought in respect of different victims, or brought regarding the same individual but concerning facts and guarantees not previously presented and which are not reformulations, do not raise issues with respect to *res judicata* and will not in principle be barred by the prohibition of duplication of claims.[103] In the present case, Mr. Domingues has not previously lodged a complaint with the Commission, raising the legality of his death sentence under the American Declaration or otherwise. Consequently, his petition cannot be considered inadmissible for duplication of claims.

103. The State has also asserted that it is "inconsistent" and "implausible" for the Commission to conclude that the prohibition of execution of juveniles violates a norm of *jus cogens* 15 years its decision in Roach and Pinkerton. As indicated in the present report, and as the State itself recognized in its response, the Commission determined in its 1987

resolution in the Roach and Pinkerton case that the prohibition against the execution of children constituted at that time a norm of *jus cogens*. The principal issue before the Commission in the present case was therefore whether it could now be said that the norm has since evolved to delimit the age of 18 as the defining age of a child for this norm. Based upon the formidable evidence of international developments on this question since 1987, the Commission concluded that it had.[104]

104. The State's objections to the Commission's reliance upon treaties inside and outside of the inter-American system as evidence of the emergence of a customary norm are also misguided. It is well-established that other treaties concerning the protection of human rights in the American states may be invoked by the supervisory bodies of the inter-American human rights system, regardless of the bilateral or multilateral character of those treaties, or whether they have been adopted within the framework or under the auspices of the inter-American system.[105] Such treaties form part of the *corpus juris gentium* of international human rights law within which states' current international obligations are to be interpreted. [106] The norms of a treaty can be considered to crystallize new principles or rules of customary law.[107] It is also possible for a new rule of customary international law to form, even over a short period of time, on the basis of what was originally a purely conventional rule, provided that the elements for establishing custom are present.[108]

105. In the present case, the State has not contested the fact that since 1987 the Convention of the Rights of the Child was adopted by the UN General Assembly, ratified by all but two states, and signed by the United States without reservation as to the prohibition of executing juvenile offenders. Overwhelming international acceptance of the principles and standards of the International Covenant on Civil and Political Rights was similarly amplified through 64 additional ratifications of or accessions to that instrument, bringing the total number of states parties to 147. Both of these instruments prescribe as part of the nonderogable right to life, which itself has been regarded by this Commission as a norm of *jus cogens*,[109] a clear and unambiguous prohibition against the execution of persons who were under the age of 18 at the time of their crimes, to which no state but the United States has purported to claim a reservation. Notwithstanding views that may have been asserted by certain states when these treaty provisions were negotiated, the fact remains that nearly all world states, abolitionist and retentionist alike, have through the acts of ratification or accession accepted this proscription unconditionally. And while the United States may rely upon a historical disconnect between the ratification and implementation of treaty provisions by states, the United States itself points out that according information compiled in 2000 by the United Nations,[110] all but 14 of the 191 states parties to the Children's Convention have enacted laws that conform with Article 37(a), and between 1994 and 1998 only four states, including the United States, are reported to have executed at least one person who was under the age of 18 at the time of their offense. State practice has therefore been remarkably consistent with these underlying international obligations.[111]

106. The State's assertions concerning evidence of *opinion juris* fail to consider several factors relating to the nature and development of *jus cogens* norms as well as the manner in which the *opinio juris* of states may be evidenced and expressed. The Commission notes in this regard that evidence of *opinio juris* may not always be necessary to determine the existence of a *jus cogens* norm. More particularly, a norm of *jus cogens* may emerge by several means, including state practice as well as through treaty provisions that are viewed as being of a peremptory nature. Genocide may be considered an example of a norm of the latter character, whereby the 1948 Genocide Convention[112] articulated the definition of genocide as an international crime and coincidentally encapsulated the international community's view that the prohibition of genocide constituted a peremptory norm of international law from which no derogation is permitted, by proclaiming in no uncertain terms that "genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world."[113] In these circumstances, evidence of *opinio juris* through state

practice followed out of a sense of legal obligation is not necessarily a prerequisite to the existence of a norm of *jus cogens*. In the context of the present case, the Commission has long considered that the international prohibition against the execution of children has attained the status of a peremptory norm. Through this report, the Commission has also considered that the international community has defined the age for the purposes of this norm as 18, based to a significant extent upon the UN Convention on the Rights of the Child and other treaty provisions prescribing this as an absolute standard. In these circumstances, evidence of *opinio juris* beyond the widely accepted and absolute prohibition under the Children's Convention, the International Covenant on Civil and Political Rights and other pertinent sources of international law of the execution of offenders under 18 years of age may not be essential in order to preclude the United States from exempting itself from this norm.

107. To the extent that evidence of *opinio juris* may be pertinent to the emergence of a *jus cogens* norm through practice, namely where it is demonstrated that states have followed a given practice not only out of a sense of legal obligation but out of recognition that the resulting obligation is of a peremptory nature, the United State's position fails more broadly to take into account the particular role that treaties and other international instruments may play in this connection. Where an instrument is widely ratified or endorsed by members of the international community and speaks to the legality of certain actions, the provisions of that instrument might themselves properly be considered as evidence of *opinion juris*.[114] Human rights treaties are particularly significant in this respect, as they are widely regarded as recognizing and building upon rights that already exist by reason of the attributes of the human personality and which therefore may not be abrogated by any state.[115] Further, by these instruments, states are deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.[116]

108. That States have denounced the execution of juveniles out of a sense of legal obligation is also born out in the nature of the specific prohibition at issue, which instructs states as to the manner in which they may and may not apply their domestic criminal law so as to deprive individuals of their most fundamental right, their right to life. It is difficult to conceive of more compelling evidence of states' views as to the legally binding nature of international prescriptions than the amendment of their domestic criminal laws to comply with those obligations.[117] As was apparent from the evidence canvassed by the Commission in its merits decision in this matter, therefore, state measures in eradicating the juvenile death penalty may properly be considered to have been undertaken out of a sense of legal obligation to respect fundamental human rights.

109. Finally, as to the State's attempt to discount related developments in other areas of international law and practice, including the treatment of children in armed conflict, the Commission reiterates its contrary view that these initiatives are pertinent to the issues presently under consideration as they, like the international prohibition of the juvenile death penalty, are motivated by a common precept, namely the widely accepted view that age 18 is the threshold that society has generally drawn at which a person may reasonably be assumed able to make and bear responsibility for their judgments, including and in particular those by which they may forfeit their lives.[118] To deprive individuals of their lives based upon acts taken by them before they reached the age of 18 is therefore regarded by the international community as a disproportionate punishment that violates contemporary standards of humanity and decency and is therefore prohibited in all circumstances.

110. Based upon the State's response, the Commission concludes that no measures have been taken to comply with the Commission's recommendations. On this basis, and having considered the State's observations, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VI. CONCLUSIONS

111. The Commission, based upon the foregoing considerations of fact and law, and in light of the response of the State to Report 116/01, hereby ratifies the following conclusions.

112. The Commission, based upon the foregoing considerations of fact and law, hereby concludes that the State has acted contrary to a international norm of *jus cogens* as reflected in Article I of the America Declaration by sentencing Michael Domingues to the death penalty for crimes that he committed when he was 16 years of age. Consequently, should the State execute Mr. Domingues pursuant to this sentence, it will be responsible for a grave and irreparable violation of Mr. Domingues' right to life under Article I of the American Declaration.

VII. RECOMMENDATIONS

113. In accordance with the analysis and conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

1. Provide Michael Domingues with an effective remedy, which includes commutation of sentence.

2. Review its laws, procedures and practices to ensure that capital punishment is not imposed upon persons who, at the time their crime was committed, were under 18 years of age.

VIII. NOTIFICATION AND PUBLICATION

114. In light of the above, and given the exceptional circumstances of the present case, where the victim remains under imminent threat of execution pursuant to a death sentence that the Commission has determined to be invalid and where the State has clearly indicated its intention not to comply with the Commission's recommendations concerning violations of the American Declaration of the Rights and Duties of Man, the Commission has decided pursuant to Article 45(2) and (3) of its Rules of Procedure to set no further time period prior to publication for the parties to present information on compliance with the recommendations, to transmit this Report to the State and to the Petitioner's representatives, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the twenty-second day of the month of October, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vice-President; José Zalaquett, Second Vice-President; Julio Prado Vallejo, Clare K. Roberts and Susana Villar[ian Commissioners.

CONCURRING OPINION OF COMMISSIONER HÉLIO BICUDO[119]

1. Although I endorse the findings, reasoning and motives of my fellow commissioners in this report, I would like to take the matter further and express my understanding concerning the lawfulness of the death penalty in the inter-American system.

2. The American Declaration of the Rights and Duties of Man (hereinafter "American Declaration"), approved at the Ninth International American Conference, which took place in Santa Fe de Bogotá in May and June of 1948, affirms that "Every human being has the right to life, liberty and the security of his person" (Article I) and, moreover, that "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor" (Article II).

3. Article 4 of the American Convention on Human Rights (hereinafter "American Convention"), approved on November 22, 1969 in San Jose, Costa Rica, states that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

4. At the same time, the American Convention, by including the right to personal integrity in the civil and political rights framework, affirms that "No one shall be subjected to torture or to cruel, inhumane, or degrading punishment or treatment."

5. However, death penalty is provided for in the American Convention in its original version. Article 4, Section 2 allows the death penalty to be applied by member states only for the most serious crimes.

6. There is a contradiction among the aforementioned articles which repudiate torture, cruel, inhumane or degrading punishment or treatment.

7. The American Declaration considers life to be a fundamental right, and the American Convention condemns torture or the imposition of cruel, inhumane or degrading punishment or treatment. The elimination of a life could be deemed torture or cruel, inhumane or degrading punishment or treatment.

8. It seems that the tolerance expressed in Article 4, Section 2 of the American Convention reveals the sole adoption of a political position of conciliation between all member states in order to approve a more general article, the one about the right to life.

9. Before analyzing what it means for some States to retain the death penalty as a part of their legal systems, it is important to note that the Inter-American Convention to Prevent and Punish Torture, signed in Cartagena de Indias, Colombia, on December 9th, 1985, describes the meaning of torture as follows: "Torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose" (Article 2).

10. Notice that this article addresses torture as a personal punishment or penalty in all circumstances.

11. The death penalty brings immeasurable suffering to the individual. Is it possible to imagine the anguish that the individual feels when he/she is informed of the verdict? Or the moments leading up to the actual execution? Would it be possible to evaluate

the suffering of those who wait on death row for execution, in some cases for several years? In the United States, fifteen, sixteen or seventeen year-old minors, who committed homicide and subsequently received the death penalty, wait for fifteen years or longer for their execution. Is it possible to imagine a fate worse than remaining between hope and despair until the day of execution?

12. The OAS member states, by adopting the Convention on Forced Disappearance of Persons, reaffirms that "the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in the Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights."

13. It is important to mention that in 1998 and 1999, the United States was the only country in the world known for executing minors under 18 years of age. To that extent, it is important to note that the United States has accepted the International Covenant on Civil and Political Rights since September 1992, Article 6(5) of which establishes that the death penalty cannot be imposed on minors under 18 years old or on pregnant women. The U.S. Senate opted to express its reservation to this section at the moment of its ratification but currently there is an international consensus opposed to that reservation based on Article 19(c) of the Vienna Convention on the Law of Treaties. This Convention gives the State the possibility to formulate reservations, but these reservations cannot be incompatible with the object and purpose of the treaty.

14. In June 2000, Shaka Sankofa, formerly known as Gary Graham, was convicted in the State of Texas for a crime he committed when he was 17 years old. He was executed after waiting 19 years on death row, although the Inter-American Commission on Human Rights (hereinafter "IACHR" or "Commission") had formally presented requests to the American government to suspend the act until the case was decided by the Commission. There were serious doubts regarding whether Shaka Sankofa had really committed the crime. The U.S. Government did not respond to the Commission's recommendation but could not escape from the jurisdiction of the IACHR on the protection of human rights, according to the American Declaration. The Commission thus sent out a press release condemning the U.S. decision, since it was not in accordance with the inter-American system of protection of human rights.[120]

15. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (hereinafter "Convention of Belem do Pará"), approved in Belem do Pará, Brazil, on June 9, 1994, does not allow the imposition of the death penalty on women. Article 3 states "Every woman has the right to be free from violence in both the public and private spheres" and Article 4 states that "Every woman has the right to have her life respected". Regarding the duties of States, the Convention of Belem do Pará establishes that States should "refrain from engaging in any act or practice of violence against women and ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation". Therefore, if every woman has the right to life, and the right to be free from violence, and the State is denied the practice of violence against women, it seems that the Convention of Belem do Pará prohibits the application of the death penalty to women. There is no discrimination against men or children. It cannot be argued that it is "positive discrimination" or "affirmative action", because it only serves to preserve the inherent rights of the individual. For instance, pregnant women or women with children are entitled to rights based solely on the fact of their exclusive female condition. Thus, the same rights cannot be extended to men. Positive discrimination is usually applied to bring about equality, through temporary and proportional measures, to groups of people that experience *de facto* inequality. There is no inequality between men and women with regard to the right to life. In any case, the imposition of the death penalty is not a proportional measure, as we will see later on. When it comes to common rights–such as the right to life-we cannot argue positive

discrimination. All persons are equal before the law. The prohibition of the death penalty for women was based on both the female condition and the human condition.

16. Article 24 of the American Convention affirms that all persons are equal before the law, and consequently, they are entitled, without discrimination, to equal protection of the law. Although that Convention does not define discrimination, the IACHR understands that discrimination includes distinction, exclusion, restriction or preference which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life (Manual on the Preparation of Reports on Human Rights, International Covenant on Civil and Political Rights, Article 26.)

17. It is also important to note that Article 37(a) of the Convention on the Rights of the Child prohibits the imposition of the death penalty on minors under 18 years of age.

18. The above-mentioned Convention is considered a universal legal instrument in the area of human rights. (Only the United States and Somalia have failed to ratify it.)

19. Article 37 of the Convention on the Rights of Child states: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."

20. Although the U.S. has not ratified the Convention on the Rights of the Child, it became a signatory to the Convention in February 1995, and has thus accepted its legal obligations. Article 18 of the Vienna Convention on the Law of Treaties establishes that the States that have signed a treaty, but not ratified it, shall refrain from engaging in any act that is contrary to its purpose until it has decided to announce its intention of not becoming part of that treaty. Despite the fact that the U.S. has not ratified the Convention, the U.S. State Department has already recognized that the Vienna Convention on the Law of Treaties serves as a precedent for international treaty proceedings. The U.S. State Department considers the Convention a declaration of customary law based on the Vienna Convention on the Law of Treaties, which establishes the importance of treaties as sources of international law as well as a method of peaceful development and cooperation between nations, no matter what their Constitutions and social systems entail.

21. As mentioned above, the imposition of the death penalty against women is not a case in which positive discrimination could be applied because Article 37(a) of the Convention on the Rights of the Child aims to preserve rights that are created not only for children but for all human beings.

22. If that is the case, then Article 4 of the American Convention has lost its previous meaning. Therefore States that have signed and ratified it as well as other international instruments cannot impose the death penalty upon any person, regardless of gender or any other personal condition.

23. The issue will be examined under legal hermeneutics of positive law. International law presupposes [normative] dispositions that are above [the] State [law]. As set forth by the illustrious Italian jurist, Norberto Bobbio, *universalism*–which international law attempts to embody–reappears today, specially after the end of WWII and the creation of the UN, no longer as a belief in an eternal natural law [order], but as the will to constitute, in the end, a single body of positive law of the social and historical development (as natural law and the state of nature). He also ponders that the idea of the single global State is the final limit of the idea of the contemporary juridical universalism, that is the establishment of a universal

positive law (Cf. *Teoria do Ordenamento Jurídico*, Universidade de Brasília, 1991, p. 164).

24. In the present case, we cannot allow a previous law with the same content of a new law to supersede the new law. That would be considered as antinomy, and therefore it has to be solved. What are the rules that should prevail? There is no doubt that they are incompatible. But how could we solve the problem?

25. According to Mr. Bobbio, the criteria to solve an antinomy are the following: a) chronological criteria, b) hierarchical criteria, c) specialty criteria.[121]

26. According to the chronological criteria the new law prevails over the previous law–*lex posteriori derogat priori.* According to the hierarchy criteria, international law prevails over national law. Lastly, the specialty criteria could also apply in this case, since it is a specific law with a specific purpose.

27. It is impossible to argue that death penalty as described in the Section 2 of Article 4 of the American Convention is a specific law as opposed to general law of the right to life. It is also not possible to accept the idea that death penalty is considered a particular penalty that does not entail a violation of right to life or torture or any other cruel or inhumane treatment.

28. The Inter-American Court of Human Rights affirms that the imposition of restrictions on the death penalty should be effected by setting up a limit through an irreversible and gradual process, which would be applied both in countries that have not abolished the death penalty and in those that have done so. (Advisory Opinion – OC-3/83)

29. The Court also understands that the American Convention is progressive to the extent that, without deciding to abolish the death penalty, it adopts certain measures to limit it and diminish its application until it is no longer applicable.

30. It is worth reviewing the preparatory work of the American Convention that illustrates the interpretation of Article 4. The proposal to outlaw the death penalty made by several delegations did not receive any opposing vote, despite the fact that the majority of votes had not been reached. The development of negotiations in the Conference can be reviewed in the following declaration presented before the Plenary Session of Completion and signed by 14 of 19 participants (Argentina, Costa Rica, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela):

"The delegations that sign below, participants of the Specialized Inter-American Conference on Human Rights, taking into consideration the highly prevailing feeling, expressed in the course of the debates on the abolishment of the death penalty, in accordance with the purest humanistic traditions of our peoples, solemnly declare our firm aspiration of seeing the application of the death penalty in the American context eradicated as of now, and our indeclinable purpose of effecting all possible efforts so that, in the short term, an additional protocol to the American Convention on Human Rights 'Pact of San Jose, Costa Rica' might be adopted, consecrating the definitive abolition of the death penalty, and putting America once more in the forefront of the protection of fundamental human rights." (author's translation from the original in Spanish, Acts and documents, OAS/Ser. K-XVI-I2, Washington – DC, 1973, hereafter Acts and Documents, repr. 1978, Spanish version, p. 161, 195, 296 and 449/441).

31. In agreement with these assertions, the Commission's Rapporteur made

clear, on this article, his firm tendency towards the abolition of this penalty. (Acts and documents, supra, n.296)

32. Moreover, the rule of law (*Estado de derecho*) implies, when punishment is imposed, the knowledge of what the penalty actually means. When the purpose of the punishment applied is not only retribution, but the recuperation or rehabilitation of the convict, he or she knows what will happen in his or her future. If the punishment is purely retributive, as in a sentence imposing imprisonment for life, the convict still envisages his future. But if the convict is sentenced to death, the State does not point to what the elimination of his being will bring him. Science, with all its developments, has not managed, up to now, to unveil the after-death: future life, with prize or punishment? Pure and simple elimination?

33. In this sense, the rule of law forbids the imposition of a penalty whose consequences cannot be unveiled.

34. In truth, all punishment enacted by the legislator constitutes *species* of sanctions, distributed according to a rational scale that attempts to take into consideration a series of factors specific to each hypothesis of unlawfulness.

35. The right and obligation to punish which belongs to the State expresses itself in a variety of figures and measures, according to gradual solutions, measurable in money or in amounts of time. This gradual order is essential to criminal justice, for it would not be realized without a superior criterion of equality and proportionality in the distribution of punishment, for transgressors would then receive more than their just deserts.

36. With the imposition of the death penalty, however, the aforementioned serial harmony is abruptly and violently shattered; one jumps from the temporal sphere into the non-time of death.

37. With what objective criterion or with what rational measure (for *ratio* means reason and measure) does one shift from a penalty of 30 years imprisonment or a life sentence to a death penalty? Where and how is proportion maintained? What is the scale that ensures proportionality?

38. It could be argued that there is also a qualitative difference between a fine and detention, but the calculus of the former can be reduced to chronological criteria, being determined, for instance, in terms of work days lost, so that it has a meaning of punishment and suffering to the perpetrator, linked to his patrimonial situation. In any circumstance, these are rational criteria of convenience, susceptible to contrast with experience, that govern the passage from one type of punishment to the other, whereas the notion of "proportion" is submerged in face of death.

39. Summing up, the option for the death penalty is of such order that, as Simmel affirmed, it emphasizes all contents of the human life, and it could be said that it is inseparable from a halo of enigma and mystery, of shadows that cannot be dissipated by the light of reason: to attempt to fit it into the scheme of penal solutions is equal to depriving it from its essential meaning to reduce it to the violent physical degradation of a body (quoted by Miguel Reale, in *O Direito como experiencia*).

40. Hence, the conclusion of the eminent philosopher and jurist Miguel Reale: Analyzed according to its semantic values, the concept of punishment and the concept of death are logically and ontologically impossible to reconcile and that, therefore the "death penalty" is a *"contradictio in terminis"* (cf. *O Direito como Experiencia*, 2nd edition, Saraiva,

Sao Paulo, Brasil)

41. The jurist Hector Faundez Ledesma writes on this topic: "as the rights consecrated in the Convention are minimum rights, it cannot restrict their exercise in a larger measure than the one permitted by other international instruments. Therefore, any other international obligation assumed by the State in other international instruments on human rights is of utmost importance, and its coexistence with the obligations derived from the Convention must be taken into consideration insofar as it might be more favorable to the individual."

42. "The same understanding", continues the jurist, "is extensive to any other conventional provision that protects the individual in a more favorable way, be it contained in a bilateral or multilateral treaty, and independently of its main purpose" (*El Sistema Interamericano de Protección de los Derechos Humanos*, 1996, pp. 92-93).

43. Moreover, Article 29(b) of the American Convention establishes, in the same line of thought, that no disposition of the Convention may be interpreted in the sense of "restricting the enjoyment or exercise of any right or freedom recognized by the virtue of the laws of any State Party". In this sense, it is opportune to refer to the IACHR report on Suriname, and the Advisory Opinions 8 and 9 (of the Inter-American Court on Human Rights, 1987).

44. On this opportunity, the IACHR affirmed that the prohibition of imposing the death penalty in cases where the offender was a minor at the time of the crime was an emerging principle of international law. Twelve years later there is no doubt that this principle is totally consolidated. The ratification of the Convention on the Rights of the Child by 192 States, where the death penalty of minor offenders is prohibited, is a irrefutable proof of the consolidation of the principle (Cf. Report presented by Amnesty International to the IACHR, in Washington, on March 5th, 1999).

45. It is true that the Universal Declaration on Human Rights does not refer specifically to the prohibition of the death penalty, but consecrates in its Article 3 the right of every person to his life, liberty and security (the same provision can be found on Article I of the American Declaration of the Rights and Duties of Man). Adopted by the General Assembly of the United Nations in 1948, under the guise of a recommendatory resolution, the Universal Declaration is held–by many important scholars–to be a part of the body of international customary law and a binding norm (*jus cogens*)–as defined in Article 53 of the Vienna Convention on the Law of Treaties. *Mutatis Mutandi*, it would be lawful to affirm that the Convention on the Rights of the Child, by reason of its breadth and binding character, must also be observed by the only two States that have not ratified it, as has already been said, and has been recognized by the Department of State of the United States of America.

46. It is convenient to observe, furthermore, that the European Court of Human Rights, in its decision in the Soering Case–Jens Soering, born in Germany, in detention in England and submitted to an extradition procedure on behalf of the government of the United States pending charges of murder committed in Virginia, a State that punishes this crime with the death penalty–made opportune comments regarding Article 3 of the European Convention, which establishes the interdiction of torture, inhuman, cruel or degrading treatment or punishment. The Court considered that the request could not be granted unless the person subject to extradition would be guaranteed his or her rights under Article 3 of the Convention (cf. *Jurisprudence de la Cour europeenne des droits de l'homme,* 6th ed. 1998, Sirey, Paris, pp. 18 and ff.).

47. The Court concluded that the extradition to a country that applied the death penalty did not constitute a breach of the right to life or to the right to personal integrity since

the death penalty is not, in itself, explicitly prohibited by the European Convention. Nonetheless, the possibility that the condemned could spend years waiting for the moment–totally unpredictable, by the way–of the execution of the punishment, the so called "death row syndrome", was considered by the Court as constituting a cruel treatment and, therefore, a breach of the right to personal integrity.

48. It is, doubtlessly, an ambiguity: if there is a delay in imposing the penalty, there is violation of the right; if the sentence is carried out immediately, the State's action will not be considered a breach of the fundamental right to life.

49. This decision gives rise to the conclusion that little by little, the traditional vision, the positivistic application of the law, is being abandoned. Instead of a literal interpretation of the texts in discussion, a teleological hermeneutics is searched, in this case, of the European Convention, to achieve the major conclusion that the death penalty should not be permitted in any hypothesis.

50. Therefore, the absolute prohibition, in the European Convention, of the practice of torture or of inhuman or degrading treatment or punishment shows that Article 3, referred to above, proclaims one of the fundamental values of democratic societies. The judgment underlines that provisions in the same sense can be found in the International Covenant on Civil and Political Rights of 1966, and in the American Convention on Human Rights of 1969, protecting, in all its extension and depth, the right of the human person. The Court concludes that it is an internationally approved norm.

51. It is true that the concept of inhuman or degrading treatment or punishment depends upon a whole set of circumstances. It is not for any other reason that one should have utmost care to ensure the fair balance between the requirements of the communities' general interest and the higher imperatives of the protection of the fundamental rights of the individual, that take form in the principles inherent to the European Convention taken as a whole.

52. Amnesty International has affirmed that the evolution of the norms in Western Europe concerning the death penalty leads to the conclusion that it is an inhuman punishment, within the meaning of Article 3 of the European Convention. It is in this sense that the judgment of the court in the Soering case should be understood.

53. For its part, the Inter-American Court on Human rights has already affirmed that "The right to life and the guarantee and respect thereof by States cannot be conceived in a restrictive manner. That right does not merely imply that no person may be arbitrarily deprived of his or her life (negative obligation). It also demands of the States that they take all appropriate measures to protect and preserve it (positive obligation)." (Cf. *Repertorio de Jurisprudencia del Sistema Interamericano de Derechos humanos*, 1998, Washington College of Law, American University, 1/102)

54. It was for the same reason that the European Court, in the aforementioned Soering decision, considered that "Certainly, the Convention is a living instrument which ... must be interpreted in the light of present-day conditions"; and, in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Article 3 (art. 3), "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field" (par. 102).

55. In fact, to determine whether the death penalty, because of current modifications of both domestic and international law, constitutes a treatment prohibited by

Article 3, it is necessary to take into consideration the principles that govern the interpretation of that Convention. In this case, both in the European Convention and in the American Convention, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Article 3 of the European Convention); "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." (Article 5(2) of the American Convention on Human Rights).

56. In the same line of thought, in the case between Ireland and the United Kingdom, the European Court had already decided that "The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct (...) Article 3 (Art. 3) makes no provision for exceptions (...)the only relevant concepts are "torture" and "inhuman or degrading treatment", to the exclusion of "inhuman or degrading punishment".(par. 163-164)

57. More recently, in its Advisory Opinion OC-16, of October 1st, 1999, requested by Mexico, the Inter-American Court of Human Rights considered it opportune to state that, as regards the right to information about consular assistance, as part of the due process guarantees, that "in a previous examination of Article 4 of the American Convention, the Court observed that the application and imposition of capital punishment are governed by the principle that "no one shall be arbitrarily deprived of his life." Both Article 6 of the International Covenant on Civil and Political Rights and Article 4 of the Convention require strict observance of legal procedure and limit application of this penalty to "the most serious crimes." In both instruments, therefore, there is a marked tendency toward restricting application of the death penalty and ultimately abolishing it. (par. 134)

58. It is reasonable to ask what is still lacking for the universal elimination of the death penalty? Simply the total recognition of the rights emanated from the treaties.

59. In support of this idea, we find the concurring vote, in the above-mentioned Advisory Opinion requested by Mexico, of Judge Cançado Trindade, wherein relevant assertions are made concerning the hermeneutics of law in face of the new protection demands.

60. In his concurring vote, the illustrious international legal scholar and current President of the Court (1999/2001) underlines that "The very emergence and consolidation of the *corpus juris* of the International Law of Human Rights are due to the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (*el Derecho*) came to the encounter of the human being, the ultimate addressee of its norms of protection." (Concurring vote, par.4)

61. The author of the concurring vote also warns that "In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised" (*ibid*, par. 10)

62. In this sense the European Court on Human Rights, in its Tyrer vs. United Kingdom Case (1978), when determining the unlawfulness of physical punishment applied to teenagers in the Isle of Man, affirmed that the European Convention on Human Rights is "a living instrument which ... must be interpreted in the light of present-day conditions".

63. Finally, with the demystification of the postulates of the voluntarist legal positivism, it has become clear that the answer to the problem of the basis and the validity of general international law can only be found in the universal legal consciousness, from the

affirmation of an idea of objective justice.

64. Furthermore, in a meeting of representatives of the human rights treaty bodies, it was emphasized that conventional procedures are part of a broad international system of human rights protection, which has–as a basic postulate–the indivisibility of human rights (civil, political, economic, social and cultural). To ensure in practice the universalization of human rights, the meeting recommended the universal ratification, up to the year 2000, of the six core human rights treaties of the United Nations (the two International Covenants of 1966; the conventions on the elimination of racial discrimination and discrimination against women; the UN Convention against Torture; and the Convention on the Rights of the Child), of the three regional conventions on human rights (European, American and African), and the ILO Conventions that concern basic human rights. The representatives at the meeting warned that the non-compliance by the states in respect of their obligation to ratify constituted a breach of conventional international obligations and that the invocation of state immunity, in this context, would result in a "double standard" that would punish the States that duly complied with their obligations. (Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol 1, Fabris Ed. 1997, pp. 199-200)

65. Article 27 of the Vienna Convention on the Law of Treaties of 1969 forbids the invocation of domestic law to justify the non-compliance of an international obligation. Moreover, according to Article 31 of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their contest and in light of its object and purpose". It follows also that, according to the doctrine of "effet utile", the interpreter must not deny any term of a normative provision its value in the text: no provision can be interpreted as not having been written.

66. In effect, the Inter-American Court, in its Advisory opinion OC-14/94, has held that: "Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions [Greco-Bulgarian "Communities", Advisory Opinion, 1930, P.C.I.J., Series B, Nº 17, p.32; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, Nº 44, p. 24; Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, Nº 46, p. 167; and, I.C.J. Pleadings, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Case of the PLO Mission) (1988) 12, at 31-2, para. 47]." (par. 35)

67. In view of the considerations presented here, it can be said that the norm of article 4, section 2 of the American Convention has been superseded by the aforementioned conventional provisions, following the best hermeneutic of the International Law of Human Rights, with the result that it is prohibitive, for domestic
law–even if older than the American Convention–to apply cruel punishment, such as the death penalty.

68. This result also follows from the principle of the International Law of Human Rights that all action must have as its basic goal the protection of victims.

69. In light of these considerations, provisions such as Article 4(2) of the American Convention on Human Rights should be disregarded, in favor of legal instruments that better protect the interests of the victims of violations of human rights.

Done and signed by the Inter-American Commission on Human Rights, in the city of

Washington, D.C., the 15th day of the month of October, 2001. (Signed): Hélio Bicudo.

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* Commission Member Professor Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

[1] During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission's prior Regulations of April 8, 1980. Pursuant to Article 78 of the Commission's Rules of Procedure, the Rules entered into force on May 1, 2001. Article 29(2) of the Commission's prior Regulations has been replaced by Article 25(1) of the Rules of Procedure, which provides: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."

[2] Petitioner's petition dated December 7, 2000, p. 5.

[3] Petitioner's petition dated December 7, 2000 p. 9 citing James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 56, 57, 60.

[4] Article 6(5) of the ICCPR prohibits the imposition of the death sentence for crimes committed by persons below eighteen years of age. The Petitioner contends that the United States' reservation to Article 6(5) of the ICCPR is invalid under Article 19 of the Vienna Convention because it "is incompatible with the object and purpose of the treaty."

[5] Petitioner's petition dated December 7, 2000, p. 14.

[6] Petitioner's petition dated December 7, 2000, pp. 14-15, citing UN Doc. E/CN.4/Sub.2/1999/RES/4 (24 August 1999); Question of the Death Penalty, UN Hum. Rts. Comm. Res. 1997/12 adopted April 3, 1997.

[7] Petitioner's petition dated December 7, 2000, p. 16, citing Amnesty International, Juveniles and the Death Penalty, at 3-6 November 1998; Fight the Death Penalty in USA, Death Penalty for Juvenile Offenders (Jan. 26, 1999) as indicating that since 1990, only the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the United States are known to have executed children who were under 18 years of age at the time of their offense.

[8] Petitioner's petition dated December 7, 2000, p. 17 (indicating that on July 8, 1999, the Supreme Court of Florida ruled that the execution of a person who was 16 years old at the time of his crime violated the Florida Constitution and its prohibition against cruel and unusual punishment, and that on April 30, 1999, the Governor of Montana signed into effect a law that raised the minimum age of offenders who are eligible for the death penalty from 16 to 18 years); Brennan v. Florida, 754 So.2d 1 (Fla. July 8, 1999), *rehearing denied* October 21, 1999; Mont. Code Ann. §§ 45-2-102 (1999).

[9] Roach and Pinkerton v. United States, *supra*, para. 63.

[10] Petitioner's petition dated December 7, 2000, p. 20.

[11] Petitioner's petition dated December 7, 2000, pp. 21-26. The Petitioner argues, *inter alia*, that the State's reservation to Article 6(5) of the ICCPR is invalid as contrary to the object and purpose of the treaty and to a norm of *jus cogens*, and cites Articles 19 and 53 of the Vienna Convention on the Law of Treaties, an April 6, 1995 report of the U.N. Human Rights Committee finding the U.S. reservation to Article 6(5) to be incompatible with the object and purpose of the Covenant, and direct objections to the U.S. reservation lodged by at least eleven other signatory countries to the ICCPR).

[12] Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969), Article 18.

[13] *See e.g.* Desmond McKenzie et al. v. Jamaica, Case 12.023, Annual Report of the IACHR 1999; Garza v. United States, *supra*.

[14] The Inter-American Court of Human Rights and this Commission have previously determined that the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights, based upon Articles 3, 16, 51, 112, and 150 of the OAS Charter. *See* I/A Court H.R., Advisory Opinion OC-10/89 Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45; Roach and Pinkerton v. United States, *supra*, paras. 46-49. *See also* Statute of the Inter-

American Commission on Human Rights, Article 20.

[15] Article 31(1) of the Commission's Rules of Procedure provides: "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."

[16] Article 32 of the Commission's Rules of Procedure provides: "The Commission shall consider those petitions that are lodged within a period of six-months following the date on which the alleged victim has been notified of the decision that exhausted domestic remedies."

[17] Article 33(1)(a) of the Commission's Rules of Procedure provides: "The Commission shall not consider a petition if its subject matter: a. is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member."

[18] Article 32(2)(b) of the Commission's Rules of Procedure provides: "However, the Commission shall not refrain from considering petitions referred to in paragraph 1 when: (b) the petitioner before the Commission or a family member is the alleged victim of the violation denounced and the petitioner before the other organization is a third party or a nongovernmental entity having no mandate from the former."

[19] Article 34 of the Commission's Rules of Procedure provides: "The Commission shall declare any petition or case inadmissible when: a. It does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure; b. the statements of the petitioner or of the State indicate that it is manifestly groundless or out of order; or c. supervening information or evidence presented to the Commission reveals that a matter is inadmissible or out of order."

[20] *See e.g.* I/A Court H.R., Advisory Opinion OC-16/99 (1 October 1999) "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law", para. 136 (finding that "[b]ecause execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result"); *Baboheram-Adhin et al. V. Suriname,* Communication Nos. 148-154/1983, adopted 4 April 1985, para. 14.3 (finding that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state.); Report by the U.N. Special Rapporteur on Extra-judicial Executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1994/82, Question of the Violation of Human Rights and Fundamental Freedoms in any part of the World, with particular reference to Colonial and Other Dependent Countries and Territories, UN Doc.E/CN.4/1995/61 (14 December 1994) (hereinafter "Ndiaye Report"), para. 378 (emphasizing that in capital cases, it is the application of the standards of fair trials to each and every case that needs to be ensured and, in case of indications to the contrary, verified, in accordance with the obligation under international law to conduct exhaustive and impartial investigations into all allegations of violation of the right to life.).

[21] *See e.g.* IACHR, Andrews v. United States, Report 57/96, Annual Report of the IACHR 1997), paras. 170-171; IACHR, Baptiste v. Grenada, Report Nº 38/00, Annual Report of the IACHR 1999, paras. 64-66; McKenzie et al. v. Jamaica, Report Nº 41/00, Annual Report of the IACHR 1999, paras. 169-171.

[22] *See* IACHR, Santiago Marzioni v. Argentina, Report Nº 39/96, Annual Report of the IACHR 1996, p. 76, paras. 48-52. *See also* IACHR, Clifton Wright v. Jamaica, Report Nº 29/88, Annual Report of the IACHR 1987-88, p. 154.

[23] *See e.g.* Marzioni v. Argentina, *supra;* Wright v. Jamaica, *Case, supra;* Baptiste v. Grenada, *supra,* para. 65; McKenzie *et al.* V. Jamaica, *supra,* para. 170.

[24] Roach and Pinkerton v. United States, *supra.*

[25] Roach and Pinkerton v. United States, *supra*, paras. 56, 57.

[26] At the time of the Roach and Pinkerton case, these States were: California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio and Tennessee.

[27] Roach and Pinkerton v. United States, *supra*, para. 60.

[28] *See* I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989,
(Ser. A) Nº 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948). *See also* ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating

that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation").

[29] The Inter-American Court of Human Rights has viewed with approval the Commission's practice of applying sources of international law in addition to the American Convention. In its Advisory Opinion interpreting the terms "other treaties" in Article 64 of the American Convention, the Court stated:

The Commission has properly invoked in some of its reports and resolutions "other treaties concerning the protection of human rights in the American states", regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the inter-American system.

See I/A Court H.R., Advisory Opinion OC-1/82 of September 24, 1982, "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), (Ser. A) Nº 1 at para. 43 (1982).

[30] Advisory Opinion OC-16/99, *supra*, para. 114, *citing, inter alia*, the decisions of the European Court of Human Rights in Tyrer v. United Kingdom (1978), Marckx v. Belgium (1979), and Louizidou v. Turkey (1995).

[31] Article 38(1) of the Statute of the International Court of Justice prescribes what are broadly considered to constitute the primary and secondary sources of international law, namely:

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ;

a) international custom, as evidence of a general practice accepted as law ;

a) the general principles of law recognized by civilized nations ;

a) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, Art. 38(1).

[32] The Commission notes in this regard that the Inter-American Court of Human Rights has considered the U.N. Convention on the Rights of the Child to form part of the comprehensive *corpus juris* for the protection of the child that is appropriately used to establish the content and scope of the rights of the child under Article 19 of the American Convention on Human Rights. I/A Court H.R., Villagran Morales et al. Case (The "Street Children" Case), Judgment of November 19, 1999 (Merits), Annual Report 1999, p. 665, para. 194. See also IACHR, Report on the Human Rights of Asylum Seekers in the Canadian Refugee Determination System, OEA/Ser.L/V/II.106 Doc 40, rev (February 28, 2000), para. 38 (confirming that while the Commission clearly does not apply the American Convention on Human Rights in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

[33] The Restatement of Foreign Relations Law of the United States defines customary international law as constituting those rules that result from a general and consistent practice of states followed by them from a sense of legal obligation. See Restatement of Foreign Relations Law of the United States (Third) § 102(2) (1987).

[34] See Vienna Convention on the Law of Treaties, UN Doc. A/CONF. 39/27 (1969), Article 53 (providing that "[a] treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted, and which can be modified only by a subsequent norm of general international law having the same character.")

[35] Yearbook of the International Law Commission, 1950, II, 26, para. 11. See similarly IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed., 1998) at 5 (identifying four attributes of a rule of customary international law: duration; uniformity and consistency of practice; generality of practice; and *opinio juris et necessitatis*).

[36] See e.g. Asylum Case, ICJ Reports (1950), at 276-7 (stating that a part that relies on custom "must prove that this custom is established in such a manner that it has become binding on the other party [...] that the rule invoked [...] is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'").

[37] *Id.* See also J.L. BRIERLY, THE LAW OF NATIONS (6th ed., 1963) at 61-62.

[38] MALCOLM N. SHAW, INTERNATIONAL LAW (4th ed., 1997) at 66.

[39] See e.g. Anglo-Norweigian Fisheries Case, ICJ Reports (1951), p. 131 (recognizing the principle that a state may contract out of a custom in the process of formation); BROWNLIE, *supra*, at 10.

[40] IACHR, Roach and Pinkerton v. United States, Case 9647, Annual Report of the IACHR 1987, para. 55.

[41] BROWNLIE, *supra*, at 515. See also Vienna Convention on the Law of Treaties, *supra*, Articles 53, 64.

[42] See Barcelona Traction Case (Second Phase), ICJ Reports (1970) 3 at 32, sep. op. Judge Ammoun (indicating that obligations of *jus cogens* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."). See similarly East Timor Case, ICJ Reports (1995) 90 at 102.

[43] See e.g. The Restatement of Foreign Relations Law of the United States, *supra*, § 702 and comment n (indicating that while not all human rights norms are peremptory norms (*jus cogens*), several norms can be identified as falling within this category, such that an international agreement that violates them is void, if they are practiced, encouraged, or condoned as a matter of state policy: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and a consistent pattern of gross violations of internationally recognized human rights).

[44] See Richard Lillich, Civil Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 118, n. 17 (Theodor Meron ed., 1988).

[45] See e.g. The Restatement of Foreign Relations Law of the United States, supra, § 102 and report's note 6 (1986), citing Report of the Proceedings of the Committee of the Whole, May 21, 1968, UN Doc. A/Conf.39/11 at 471-72.

[46] See e.g. Roach and Pinkerton v. United States, *supra*; Andrews v. United States, Report Nº 57/96, Annual Report of the IACHR 1997.

[47] The Commission notes that according to some U.S. courts, international law that has risen to the level of a *jus cogens* norm is legally binding on domestic courts. See United States v. Mata-Ballesteros, 71 F.3d 754 (9th Cir. 1995); In Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2f 929 (D.C. Cir. 1988); White v. Paulson, 997 F. Supp. 1380 (E.D. Wash. 1998)

[48] UN Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 44th Sess., Supp. Nº 49, at 167, UN Doc. A/44/49 (1989), reprinted in 28 I.L.M. 1448 (1989). *See also* United Nations Treaty Database, U.N. Convention on the Rights of the Child (last modified September 5, 2001), <http: // untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty29.asp>.

[49] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. *See also* United Nations Treaty Database, International Covenant on Civil and Political Rights (last modified September 5, 2001), <http: // untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty29.asp>.

[50] Albania (1991); Algeria (1989); Angola (1992); Armenia (1993); Azerbaijan (1992); Bangladesh (2000); Belize (1996); Benin (1992); Bosnia and Herzegovina (1993); Botswana (2000); Brazil (1992); Burkina Faso (1999); Burundi (1990); Cambodia (1992); Cape Verde (1993); Chad (1995); Cote d'Ivoire (1992); Croatia (1992); Czech Republic (1993); Dominica (1993); Equatorial Guinea (1987); Estonia (1991); Ethiopia (1993); Ghana (2000); Greece (1997); Grenada (1991); Guatemala (1992); Haiti (1991); Honduras (1997); Ireland (1989); Israel (1991); Kuwait (1996); Kyrgyzstan (1994); Latvia (1992); Lesotho (1992); Liechtenstein (1998); Lithuania (1991); Malawi (1993); Malta (1990); Monaco (1997); Mozambique (1993); Namibia (1994); Nepal (1991); Nigeria (1993); Paraguay (1992); Republic of Korea (1990); Republic of Moldova (1993); Seychelles (1992); Sierra Leone (1996); Slovakia (1993); Slovenia (1992); Somalia (1990); South Africa (1998); Switzerland (1992); Tajikistan (1999); Thailand (1996); The Former Yugoslav Republic of Macedonia (1994); Turkmenistan (1997); Uganda (1995); USA (1992); Uzbekistan (1995); Yemen (1987); Yugoslavia (2001); Zimbabwe (1991).

[51] In addition, China and Lao People's Democratic Republic signed the Covenant in 1988 and 2000 respectively.

[52] Article 19(c) of the Vienna Convention on the Law of Treaties precludes a state from formulating reservations to a treaty when the reservation is "incompatible with the object and purpose of the treaty." The states objecting to the U.S. reservation to Article 6(5) of the ICCPR include Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden, the pertinent objections of which read as follows:

Belgium: The Government of Belgium wishes to raise an objection to the reservation made by the United States of America

regarding article 6, paragraph 5, of the Covenant, which prohibits the imposition of the sentence of death for crimes committed by persons below 18 years of age.

Denmark: In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Finland: With regard to the reservations, understandings and declarations made by the United States of America:

As regards reservation (2) concerning article 6 of the Covenant, it is recalled that according to article 4(2), no restrictions of articles 6 and 7 of the Covenant are allowed for. In the view of the Government of Finland, the right to life is of fundamental importance in the Covenant and the said reservation therefore is incompatible with the object and purpose of the Covenant.

France: At the time of the ratification of [the said Covenant], the United States of America expressed a reservation relating to article 6, paragraph 5, of the Covenant, which prohibits the imposition of the death penalty for crimes committed by persons below 18 years of age. France considers that this United States reservation is not valid, inasmuch as it is incompatible with the object and purpose of the Convention.

Germany: The Government of the Federal Republic of Germany objects to the United States' reservation referring to article 6, paragraph 5 of the Covenant, which prohibits capital punishment for crimes committed by persons below eighteen years of age. The reservation referring to this provision is incompatible with the text as well as the object and purpose of article 6, which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

Italy: The Government of Italy, ..., objects to the reservation to art. 6 paragraph 5 which the United States of America included in its instrument of ratification. In the opinion of Italy reservations to the provisions contained in art. 6 are not permitted, as specified in art.4, para 2, of the Covenant. Therefore this reservation is null and void since it is incompatible with the object and the purpose of art. 6 of the Covenant.

Netherlands: The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

Norway: With regard to reservations to articles 6 and 7 made by the United States of America: 1. In the view of the Government of Norway, the reservation (2) concerning capital punishment for crimes committed by persons below eighteen years of age is according to the text and history of the Covenant, incompatible with the object and purpose of article 6 of the Covenant. According to article 4 (2), no derogations from article 6 may be made, not even in times of public emergency. For these reasons the Government of Norway objects to this reservation.

Portugal: With regard to the reservations made by the United States of America: The Government of Portugal considers that the reservation made by the United States of America referring to article 6, paragraph 5 of the Covenant which prohibits capital punishment for crimes committed by persons below eighteen years of age is in compatible with article 6 which, as made clear by paragraph 2 of article 4, lays down the minimum standard for the protection of the right to life.

Spain: With regard to the reservations made by the United States of America: After careful consideration of the reservations made by the United States of America, Spain wishes to point out that pursuant to article 4, paragraph 2, of the Covenant, a State Party may not derogate from several basic articles, among them articles 6 and 7, including in time of public emergency which threatens the life of the nation. The Government of Spain takes the view that reservation (2) of the United States having regard to capital punishment for crimes committed by individuals under 18 years of age, in addition to reservation (3) having regard to article 7, constitute general derogations from articles 6 and 7, whereas, according to article 4, paragraph 2, of the Covenant, such derogations are not to be permitted. Therefore, and bearing in mind that articles 6 and 7 protect two of the most fundamental rights embodied in the Covenant, the Government of Spain considers that these reservations are incompatible with the object and purpose of the Covenant and, consequently, objects to them.

Sweden: A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States Parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties. Sweden therefore objects to the reservations made by the United States to: [...] article 6; cf. Reservation (2).

UN Treaty Database, ICCPR, *supra*.

[53] UNHRC, Comments on the United States of America, UN Doc. CCPR/C/79/Add.50 (1995). *See also* Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant, U.N. Hum. Rts. Comm., 53d Sess., 1413th mtg, at

para. 14, U.N. Doc. CCPR/C/79/Add.50 (1995).

[54] Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.8 (22 May 2001), p. 48.

[55] *See generally* IACHR, Juan Carlos Abella v. Argentina, Case 11.137, Report Nº 55/97, Annual Report of the IACHR 1997, para. 158 (recognizing that the American Convention, as well as other universal and regional human rights instruments, and the 1949 Geneva Conventions "share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.").

[56] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, Article 68. *See also* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 U.N.T.S. 3, Art. 77(5) (providing that the "death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed."); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 U.N.T.S. 609, Art. 6(4) (providing that the "death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence").

[57] International Committee of the Red Cross, International Humanitarian Law Database, Treaties, visited August 27, 2001, <http: // www.icrc.org/ihl>.

[58] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (J.S. Pictet ed., 1958), at 346-347.

[59] *See* 12 UN GAOR C.3 (819th mtg) at 287, UN Doc. A/C.3/SR.819.

[60] The Death Penalty, Pertaining in Relation to Juvenile Offenders, U.N. Sub-committee on the promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/RES/1999/4 (24 August 1999). *See similarly* The Death Penalty, Pertaining in Relation to Juvenile Offenders, U.N. Sub-committee on Promotion and Protection of Human Rights, 53rd Sess., Res. 2000/17, adopted August 17, 2000, UN Doc. E/CN.4/Sub.2/RES/2000/17 (2000).

[61] Question of the death penalty, UN Hum. Rts. Comm. Res. 1998/8, UN Doc. E/CN.4/RES/1998/8 (3 April 1998), para. 3 (a) (urging that all states that still maintain the death penalty "to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age, to exclude pregnant women from capital punishment and to ensure the right to seek pardon or commutation of sentence").

[62] Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1984/50 (25 May 1984), Annex, para. 3 (providing that "[p]ersons below 18 years of age at the time of the commission of the crime shall not be sentenced to death").

[63] *See* U.N.G.A. Res. 39/118 (14 December 1984); Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26 August to 6 September 1985) UN Doc. A/ Conf.121/22 (1985) at 86-87.

[64] UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), G.A. Res 40/33, Nov 29, 1985, Annex, rule 17.2.

[65] ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (2nd ed., 1996), at 8.

[66] Amnesty International Website, Campaigns, Death Penalty, (last modified June 1, 2001), <http://www.web.amnesty.org/rmp/dplibrary.nsf>.

[67] Amnesty International, Children and the Death Penalty, Executions Worldwide since 1990, AI Index 50/10/001111 (November 2000).

[68] Crime Prevention and Criminal Justice: Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, Report of the Secretary General, UNESCOR, Economic and Social Council, Subst. Sess., U.N. Doc. E/2000/3 (2000), para. 90.

[69] Amnesty International, Too young to vote, old enough to be executed - Texas set to kill another child offender, AI Index: AMR 51/105/2001 (July 2001), p. 32.

[70] *Id.*, indicating that Yemen abolished the death penalty for 16 and 17 year old offenders in 1994 and Pakistan followed in 2000.

[71] *Id. See also* AI-index: ACT 50/002/2001 (April 2001).

[72] Thompson v. Oklahoma, 487 U.S. 815, 823-831(1988).

[73] *Id.*

[74] *Id.*

[75] Brennan v Florida 754 So. 2d 1 (Fla. July 8, 1999) following its decision in Allen v The State 636 So. 2d 494 (Fla. 1994).

[76] These 16 jurisdictions include California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, Montana, and the Federal Government.

[77] Roach and Pinkerton v. United States, *supra*, para. 57.

[78] Five states have chosen age seventeen as the minimum age, Georgia, New Hampshire, North Carolina, Texas, and Florida. The other eighteen death penalty jurisdictions use age sixteen as the minimum age, either through an express age prescribed by statute or by court ruling. *See* The Juvenile Death Penalty Today: Death sentences and executions for juvenile crimes, January 1, 1973 - December 31, 2000 by Victor L. Streib Professor of Law The Claude W. Pettit College of Law Ohio Northern University Ada, Ohio 45810-1599 (last modified February 2001), <http: // www . law.onu.edu/faculty/streib/juvdeath.htm>. *See also* United States v. Burns [2001] 1 S.C.R. 283, para. 93 (Can.)

[79] 18 U.S.C. § 3591 (1994).

[80] G.A. Res. A/RES/54/263. At present, the Protocol has 4 state parties and 76 signatories.

[81] *See* U.S. Department of State publication, Office of the Press Secretary, The White House, Remarks by the President at Protocol Orders signing ceremony at the United Nations, New York, July 5 2000 (quoting U.S. President Clinton's comments on Article I of the Protocol as follows:

The Optional Protocol on Children in Armed Conflict sets a clear and a high standard: No one under 18 may ever be drafted by any army in any country. Its signatories will do everything feasible to keep even volunteers from taking a direct part in hostilities before they are 18. They will make it a crime for any non-governmental force to use children under 18 in war.[...] Every American citizen should support these protocols. They represent a worldwide consensus on basic values -- values every citizen of our country shares. [...] I am grateful for the opportunity America has had to take a leading role in negotiating these agreements, and to be among the first nations to sign them. [..] I pledge my best efforts to see that we are also leaders in implementing them.).

[82] Appropriation for the Department of Defense for Fiscal Year 1999, Section 8128(a) of the Conference Report Accompanying H.R. 4103, § B(4).

[83] *See* Resolution of the General Assembly of OAS of June 5, 2000 AG/RES. 1709 (XXX-O/00).

[84] *See e.g.* Inter-Parliamentary Union, Electoral Systems: A World-Wide Comparative Study, Geneva 1993 (reviewing the electoral systems of 150 of the world's 186 sovereign states and noting that

[t]he right to vote supposes that electors should have reached an age at which they are able to express an opinion on political matters, as a rule coinciding with the age of legal majority [...] the norm today is eighteen years; an overwhelming majority of 109 states has opted for this minimum age limit, with most other States having a slightly higher limit (19-21 years). The lowest limit 16 years - is practiced in four countries: Brazil, Cuba, Iran and Nicaragua.).

See also U.S. Const., Amend. XXVI (providing that "The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age."); Stanford v. Kentucky, 492 U.S. 361 (1989), dissenting opinions of Justices Brennan, Marshall, Blackman, and Stevens (observing that in the United States:

Legislative determinations distinguishing juveniles from adults abound. These age-based classifications reveal much about how our society regards juveniles as a class, and about societal beliefs regarding adolescent levels of responsibility [...] The participation of juveniles in a substantial number of activities open to adults is either barred completely or significantly restricted by legislation [...] No State has lowered its voting age below 18 years [..] Nor does any State permit a person under 18 to serve on a jury [...] Only four States ever permit persons below 18 to marry without parental consent [...] Thirty-

seven States have specific enactments requiring that a patient have attained 18 before she may validly consent to medical treatment [...] Thirty-four States require parental consent before a person below 18 may drive a motor car [...] Legislation in 42 States prohibits those under 18 from purchasing pornographic materials [...] Where gambling is legal, adolescents under 18 are generally not permitted to participate in it, in some or all of its forms [...] In these and a host of other ways, minors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.).

[85] Article 19 of the American Convention provides: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state."

[86] Article VII of the American Declaration provides: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."

[87] I/A Court H.R., Villagran Morales and others ("Street Children") Case, Judgment of November 19, 1999, Annual Report 1999, para. 197. *See similarly* IACHR, Argentina v. X & Y, Case Nº 10.506, Annual Report of the IACHR 1996; Eur. Court H.R., T. v. United Kingdom, Judgment of December 16, 1999; UN Standard Minimum Rules for the Administration of Juvenile Justice, *supra*, Rule 17.

[88] Article 43(2) of the Commission's Rules of Procedure provides: "If [the Commission] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline *by which the State in question must report on the measures adopted to comply with the recommendations*. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect." [emphasis added]

[89] Article 33(1)(b) of the Commission's Rules of Procedure provides: "1. The Commission shall not consider a petition if its subject matter: (b) essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member."

[90] Case 9647, Resolution Nº 3/87, Case of Jay Pinkerton and James Terry Roach (United States), Annual Report of the IACHR 1986-87.

[91] The State cites in this regard authorities indicating that Article 4(5) of the American Convention on Human Rights was approved with only a two-vote margin, with 40% of the assembled States abstaining from voting in favor of the provision, that Article 6(5) of the International Covenant on Civil and Political Rights was adopted by fifty-three votes to five with fourteen abstentions, and that Article 37 of the Convention on the Rights of the Child was adopted with the express understanding that states retained the right to ratify the Convention with a reservation to that article. The State also asserts that Article 68 of the Fourth Geneva Convention by its terms only applies to international armed conflicts and therefore cannot be considered a demonstration of custom in time of peace.

[92] State's observations of December 17, 2001 p. 4, citing Case of Roach and Pinkerton, *supra*, Dissenting Opinion of Dr. Marco Gerardo Monroy Cabra, para. 6.

[93] The State relies in this connection upon the sixth quinquennial report of the UN Secretary General on capital indicating that there were "at least 14 countries which have ratified the Convention on the Rights of the Child without reservation but, as far as is known, have not amended their laws to exclude the imposition of the death penalty on persons who committed the capital offense when under 18 years of age." Sixth quinquennial report of the Secretary General on capital punishment, reported in UN Doc. E/2000/3 (March 31, 2000), at p. 21.

[94] State's observations of December 17, 2001, p. 5, citing UN Human Rights Commission Resolution 2001/45 (Apr. 23) (Extrajudicial, summary or arbitrary executions); CHR Res. 2001/75 (Apr. 25) (Rights of the Child).

[95] *Id.* citing UN Doc. E/CN.4/2001/2 at 14.

[96] State's observations dated June 25, 2002, referring to United Nations Special Session on Children, "A World Fit for Children," Plan of Action, para. 44(8), available at <http : // www . unicef.org/specialsession/>.

[97] State's observations of December 17, 2001, p. 6, citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed., 1998), at 7; Restatement of the Foreign Relations Law of the United States (Third), § 102(2).

[98] State's observations of December 17, 2001, pp. 6-7, citing United States v. Wheeler, 435 U.S. 313 (1978) (opining that under a federal system, states are expected to have different laws because "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses"); Stanford v. Kentucky, 492 U.S. 361 (finding that the US Anti-Drug Abuse Act of 1988 "does not embody a judgment by the federal legislature that no murder is heinous enough to warrant the execution of a youthful offender, but merely that the narrow

class of offense it defines is not.").

[99] In support of its position, the State cites the instrument of ratification of the Protocol deposited with the UN by the United Kingdom, which states that "article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where: (a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and (b) by reason of the nature and urgency of the situation: (i) it is not practicable to withdraw such persons before deployment; or (ii) to do so would undermine the operational of their ship or unit, and thereby put at risk the successful completion of the military mission and/or safety of other personnel.". Multilateral Treaties deposited with the Secretary General, Vol. I, p. 299, Optional Protocol to the Convention on the Rights of the Child Concerning Children in Armed Conflict, Declaration of the United Kingdom of Great Britain and Northern Ireland (status as at 31 Dec. 2000).

[100] State's observations of December 17, 2001, p. 11, citing the US reservation to Article 6(5) of the International Covenant on Civil and Political Rights, taken after the Roach and Pinkerton decision, United Nations Multilateral Treaties Deposited with the Secretary General: Status as at 31 December 2000, UN Doc. ST/LEG/SER.E/19 (2001); Vienna Convention on the Law of Treaties, 1155 UNTS 332, 333, Art. 20(4)(b) .

[101] State's observations of December 17, 2001, pp. 12 (describing the crimes committed by Mr. Domingues as follows: "On October 22, 1993, sixteen-year-old Michael Domingues brutally murdered Arjin Chanel Pechpo and her four-year-old son, Jonathan Smith. After the victims arrived home, where Domingues was waiting for them, Domingues threatened Pechpo with a gun then tied her up with a cord which he used to strangle her. He ordered her little boy to take off his pants and get into the bathtub with his mother's dead body. When an attempt at electrocuting the four-year-old failed, Domingues stabbed Jonathan with a knife multiple times, killing him. After the murders, Domingues then bragged about killing Pechpo for her car, gave items he had stolen from Pechpo as gifts to friends, and used the victim's credit card. Domingues v. Nevada, 112 Nev. 683, 917 P.2d 1364, 112 Nev 683; 917 P.2d 1364 (1996).

[102] *See e.g.* Case 11.827, Report No. 96/98, Peter Blaine (Jamaica), Annual Report of the IACHR 1998, para. 43.

[103] *Id.*, para. 45.

[104] That human rights treaties are living instruments whose interpretation must consider changes over time and present-day conditions is well-accepted. I/A Court H.R., Advisory Opinion OC-16/99 of October 1, 1999, The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, (Ser. A) Nº 16 (1999); Eur. Court H.R., Louizidou v. Turkey, Judgment on Preliminary Objections, 23 March 1995, Ser. A Nº 310, p. 26, para. 71; I/A Court H.R., Advisory Opinion OC-10/89 of July 14, 1989, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, (Ser. A) Nº 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948); ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation"). Indeed, a similar approach to the interpretation of civil liberties under the US Constitution was recently confirmed in the June 20, 2002 decision of the US Supreme Court in the case Atkins v. Virginia, in which that Court overturned its 1989 decision in Penry v. Lynaugh by finding the development over the 13 year period of sufficient consensus among the American public, legislators, scholars and judges that the execution of mentally retarded criminals constitutes cruel and unusual punishment. Atkins v. Virginia, No. 008452, June 20, 2002 (USSC).

[105] I/A Court H.R., "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Article 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, September 24, 1982, Ser. A Nº 1 (1982), para. 43.

[106] Advisory Opinion OC-16/99, *supra*, para. 114.

[107] Military and Paramilitary Activities in and against Nicaragua (Nic. V. US) (Merits), 1986 ICJ Rep. 14, 92-6 (June 27). *See also* BROWNLIE, *supra*, at 13.

[108] North Sea Continental Shelf Case (FRG/Den.; FRG/Neth.) 1969 ICJ Rep. 3, 43-44 (Feb. 20).

[109] *See e.g.* Case 11.436, Report Nº 47/96, Victims of the Tugboat "13 de marzo" v. Cuba, Annual Report of the IACHR 1996, para. 79.

[110] State's observations of December 17, 2001, p. 7, n. 3, citing Sixth quinquennial report of the Secretary General on capital punishment, reported in UN Doc. E/2000/3 (March 31, 2000), at p. 21.

[111] It is also due to the overwhelming ratification of the Convention on the Rights of the Child that little guidance can be drawn from references in United Nations Human Rights Commission resolutions to treaty rather than customary law

obligations. While the United State relies upon this as evidence of a recognition by states that there is no customary international law prohibition on the execution of juvenile offenders, UN member states may equally have omitted references to customary international law for reasons of superfluity in light of fact that nearly all states are in fact bound to these obligations by treaty.

[112] Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force January 12, 1951.

[113] *Id.*, Preamble.

[114] *See generally* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 49 (1971).

[115] *See e.g.* American Declaration, Preamble (recognizing that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality"). See also THE INTERNATIONAL BILL OF RIGHTS 12 (Louis Henkin ed. 1981) (stating that "[i]nternational human rights instruments do not legislate human rights; they 'recognize' them and build upon their recognition").

[116] I/A Court H.R., The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82, *supra*, para, 29. In this same advisory opinion, the Inter-American Court observed that the distinct nature of human rights treaties may give rise to an enhanced risk that the application of traditional rules governing treaty interpretation, including Article 20(4) of the Vienna Convention on the Law of Treaties, may lead to manifestly unreasonable results that undermine the object and purpose of human rights instruments. Viewed from this perspective, the State's apparent suggestion that the objections of states to the United States' reservation to Article 6(5) of the ICCPR are pertinent only to the extent that those states explicitly indicate that they do not recognize the ICCPR as being in force between itself and the United States in accordance with Article 20(4)(b) of the Vienna Convention is clearly misguided – the essence of the obligations concerned are binding unilateral commitments by states not to violate the human rights of individuals within their jurisdiction, and it is therefore not reasonable to predicate the value of objections to reservations taken to those rights upon the applicability or non-applicability of those rights as between states parties to the instruments. *Id.*, paras. 29-35.

[117] J.L. BRIERLY, THE LAW OF NATIONS 61 (6th ed., 1963) (citing acts of state legislatures and state courts as particularly important sources of evidence of customary international law). It is also telling that many states, upon ratifying the ICCPR and CRC, explicitly pointed out the manner in which their domestic law conformed with this requirement. *See e.g.* UN Treaty Database, ICCPR, *supra,* Interpretive Declaration of Thailand concerning Article 6(5) on its Accession to the International Covenant on Civil and Political Rights.

[118] The proscription against executing juvenile offenders, like the initiative to establish 18 as the age at which individuals may be compelled or allowed to take up arms, has been recognized as the consequence of the broadly-held assumption that persons under the age of 18, no matter their individual capacities, are unable to appreciate fully the nature of their actions, or the extent of their own responsibility. *See e.g.* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY UNDER INTERNATIONAL LAW 122 (2d ed.); ILENE COHN & GUY S. GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 168 (1997) ; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (J.S. Pictet ed., 1958), at 346-347.

[119] When the preliminary merits report in this matter was approved pursuant to Article 43 of the Commission's Rules of Procedure, the Commission's composition included Prof. Hélio Bicudo, who at that time adopted a separate opinion. Accordingly, Prof. Bicudo's separate opinion has been included with the final report in this case approved under Article 45 of the Commission's Rules, even though Prof. Bicudo's term as a Commission Member expired on December 31, 2001.

[120] Press Release Nº 9/00, Washington, D.C. June 28, 2000:

"The Inter-American Commission on Human Rights deplores the execution of Shaka Sankofa, formerly known as Gary Graham, in the state of Texas on June 22, 2000. Mr. Sankofa was executed, despite formal requests by the Commission for the United States to ensure a suspension of Mr. Sankofa's execution pending the determination of a complaint lodged on his behalf before the Commission.

In 1993, the Commission received a complaint on behalf of Mr. Sankofa, alleging that the United States, as a Member State of the Organization of American States, had violated Mr. Sankofa's human rights under the American Declaration of the Rights and Duties of Man, including his right to life under Article I of that instrument. In particular, it was contended that Mr. Sankofa was sentenced to death for a crime that he was alleged to have committed when he was 17 years of age, that he was innocent of that crime, and that he had been subjected to legal proceedings that did not comply with international due process standards.

On August 11, 1993, the Commission opened Case Nº 11.193 in respect of Mr. Sankofa's complaint. Following a hearing on the matter on October 4, 1993, the Commission transmitted to the United States on October 27, 1993 a formal request for precautionary measures under Article 29(2) of the Commission's Regulations, asking that the United States ensure that Mr.

Sankofa's death sentence was not carried out, in light of his pending case before the Commission. At that time, Mr. Sankofa's execution, which had previously been scheduled for August 17, 1993, was postponed pending the completion of domestic judicial procedures.

In February 2000, the Commission was informed that Mr. Sankofa's domestic proceedings were nearly completed, and that the issuance of a new warrant of execution was imminent. Accordingly, in a February 4, 2000 letter to the United States, the Commission reiterated its October 1993 request for precautionary measures. Subsequently, in May 2000, the Commission received information that Mr. Sankofa's petition before the U.S. Supreme Court had been dismissed and that his execution was scheduled for June 22, 2000. Accordingly, on June 15, 2000, during its 107th Period of Sessions, the Commission adopted Report Nº 51/00, in which it found Mr. Sankofa's petition to be admissible and decided that it would proceed to examine the merits of his case. Also in this report, the Commission again reiterated its request that the United States suspend Mr. Sankofa's death sentence pending the Commission's final determination of his case.

By communication dated June 21, 2000, the United States acknowledged the receipt of the Commission's February 4, 2000 communication and indicated that it had forwarded the same to the Governor and Attorney General of Texas. On June 22, 2000, however, the Commission received information that the Texas Board of Pardons and Paroles declined to recommend that Mr. Sankofa be granted a reprieve, commutation or pardon, and that his execution was to proceed on the evening of June 22, 2000. Consequently, by communication of the same date, the Commission requested that the United States provide an urgent response to its previous request for precautionary measures. Regrettably, the United States did not respond to the Commission's June 22, 2000 request, and Mr. Sankofa's execution proceeded as scheduled.

The Commission is gravely concerned that, despite the fact that Mr. Sankofa's case had been admitted for consideration by a competent international human rights body, the United States failed to respect the Commission's requests to preserve Mr. Sankofa's life so that his case could be properly and effectively reviewed in the context of the United States' international human rights obligations. In light of the irreparable damage caused by such circumstances, the Commission calls upon the United States and other OAS Member States to comply with the Commission's requests for precautionary measures, particularly in those cases involving the most fundamental right to life."

[121] Op.cit 2, p.92.